

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
ROCHESTER DIVISION

MARLENE A. KRULY,

Plaintiff,

v.

AKOUSTIS TECHNOLOGIES, INC.,

Defendant.

Case No. 6:21-cv-06181-FPG-MWP

**APPENDIX TO DEFENDANT
AKOUSTIS TECHNOLOGIES,
INC.'S STATEMENT OF
MATERIAL FACTS PURSUANT
TO LOCAL RULE 56(a)(1)**

Pursuant to Local Rule 56(a)(1), Defendant Akoustis Technologies, Inc. hereby submits the following Appendix to its Statement of Material Facts:

1. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the transcript of the June 9, 2022 deposition of Holly Johnson.
2. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of Holly Johnson.
3. Attached hereto as Exhibit 3 is a true and correct copy of the Second Amended Complaint filed on February 17, 2022.
4. Attached hereto as Exhibit 4 is a true and correct copy of the TriNet FMLA Notice of Eligibility dated June 19, 2019, bearing production numbers Akoustis-Kruly 476-481.
5. Attached hereto as Exhibit 5 is a true and correct copy of excerpts of the transcript of the February 11, 2022 deposition of Plaintiff Marlene Kruly.
6. Attached hereto as Exhibit 6 is a true and correct copy of excerpts of the transcript of the July 1, 2022 deposition of Kenneth Boller.

7. Attached hereto as Exhibit 7 is a true and correct copy of excerpts of the transcript of the June 24, 2022 deposition of David Pettitt.

8. Attached hereto as Exhibit 8 is a true and correct copy of the Extended Leave of Absence Request Approval Form dated June 13, 2019, bearing production number Akoustis-Kruly 426.

9. Attached hereto as Exhibit 9 is a true and correct copy of excerpts of the transcript of the June 23, 2022 deposition of Lora Shealy.

10. Attached hereto as Exhibit 10 is a true and correct copy of a letter dated June 13, 2019, bearing production number Akoustis-Kruly 425.

11. Attached hereto as Exhibit 11 is a true and correct copy of an e-mail dated June 26, 2019, bearing production number Akoustis-Kruly 588.

12. Attached hereto as Exhibit 12 is a true and correct copy of an e-mail dated November 26, 2019, bearing production number Akoustis-Kruly 506.

13. Attached hereto as Exhibit 13 is a true and correct copy of an e-mail dated August 19, 2019, bearing production numbers Akoustis-Kruly 489-490.

14. Attached hereto as Exhibit 14 is a true and correct copy of Holly Johnson's notes titled "M. Kruly Data Points," bearing production numbers Akoustis-Kruly 435-437.

15. Attached hereto as Exhibit 15 is a true and correct copy of an e-mail dated May 22, 2019, bearing production number Akoustis-Kruly 382.

16. Attached hereto as Exhibit 16 is a true and correct copy of a Job Requisition Form dated July 12, 2019, bearing production numbers Akoustis-Kruly 309-310.

17. Attached hereto as Exhibit 17 is a true and correct copy of Holly Johnson's notes dated September 5, 2019 and November 8, 2019, bearing production numbers Akoustis-Kruly 714-716.

18. Attached hereto as Exhibit 18 is a true and correct copy of an e-mail dated September 10, 2019, bearing production number Akoustis-Kruly 706.

19. Attached hereto as Exhibit 19 is a true and correct copy of e-mails dated September 12-13, 2019, bearing production numbers Akoustis-Kruly 707-713.

20. Attached hereto as Exhibit 20 is a true and correct copy of a Job Requisition Form dated September 13, 2019, bearing production numbers Akoustis-Kruly 311-312.

21. Attached hereto as Exhibit 21 is a true and correct copy of an e-mail dated September 13, 2019, with attachments, bearing production numbers Akoustis-Kruly 497-499.

22. Attached hereto as Exhibit 22 is a true and correct copy of the Declaration of Holly Johnson in Support of the Motion for Summary Judgment.

Respectfully submitted,

/s/ David I. Klass

David I. Klass

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Dated: September 30, 2022

Attorneys for Defendant

EXHIBIT 1

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 -----
4 **MARLENE A. KRULY,**

5 Plaintiff,

6 -vs-

Index No. 21-CV-6181G

7 **AKOUSTIS TECHNOLOGIES, INC.,**

8 Defendant.
9 -----

10 **EXAMINATION BEFORE TRIAL OF HOLLY JOHNSON**

11 **APPEARING REMOTELY FROM**

12 **HUNTERSVILLE, NORTH CAROLINA**

13
14
15 June 9, 2022

16 2:29 p.m. - 6:03 p.m.

17 pursuant to notice

18
19
20 REPORTED BY:

21 Carrie A. Fisher, Notary Public

22 APPEARING REMOTELY FROM ERIE COUNTY, NEW YORK

23
DEPAOLO CROSBY REPORTING SERVICES, INC.

135 Delaware Avenue, Suite 301, Buffalo, New York 14202
716-853-5544

~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 Akoustis. You know, where do you have
2 employees working, and approximately how many
3 employees at each of those locations?

4 A. Well currently --

5 MS. WIESELTHIER: Objection to form. I
6 just want to clarify when you say number of
7 employees, what time period are you referring
8 to?

9 MR. SANDERS: Sure. Let's talk about
10 2019 unless I say otherwise.

11 MS. WIESELTHIER: Thank you.

12 Q. And approximately. We're not looking for
13 exact head counts.

14 A. I don't remember how many employees we had.
15 Well, okay -- well, I started in -- I started
16 in 2019 so it was very different back then. I
17 guess approximate?

18 Q. Yeah.

19 A. We had employees in North Carolina and New
20 York, and I think it was about 75 employees in
21 total.

22 Q. What was the breakdown between New York and
23 North Carolina?

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 Q. Would that have been something that she would
2 have been offered the opportunity to move to
3 North Carolina if the position moved to North
4 Carolina?

5 A. Quite possibly, yes.

6 Q. Was that something that finance had discussed?

7 A. I don't -- I don't know if they had gotten
8 that far in the discussion.

9 Q. When did finance begin discussing moving the
10 position to North Carolina?

11 A. I think it was sometime in May.

12 Q. How did it first come to your attention that
13 finance was considering moving the position to
14 North Carolina?

15 A. It was sometime just in discussions with Ken,
16 Ken Boller, and the finance team, how we were
17 going to get the work done -- or how they were
18 getting the work done that made more sense for
19 that part of the team and the function to be
20 centralized here. They had just been
21 discussing that happening. Just because I am
22 a part of the team and because of my job, I
23 get pulled into those types of discussions.

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 A. I don't -- I don't know that her name came up
2 but later on in the year we ended up hiring a
3 temporary here in North Carolina to do the
4 work.

5 Q. And that's Christine?

6 A. Kristen, yes.

7 Q. Kristen, Kristen, sorry.

8 Okay. So in the context of hiring
9 Kristen as a temp, was there a discussion
10 about whether or not that was part of a
11 permanent plan to move the function to North
12 Carolina or was that just intended as a
13 stopgap while Marlene was out?

14 A. Initially I believe that -- initially it was a
15 temporary position to get some help.

16 At first, you know, the position was
17 still in New York. Dave was -- Dave was like:
18 "I am just going to try to do the work myself.
19 I don't know how long Marlene is going to be
20 out. I don't want to hire a temp and then
21 turnaround and -- you know, train them, do all
22 that and then Marlene comes back and, you
23 know, it's just not worth the time. I'm just

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 going to do it."

2 We didn't know how long Marlene would be
3 out. Hopefully she will be back. Let's wait.
4 That was the -- that was our thought at the
5 time.

6 Q. And at that point in time Dave is working in
7 New York and Kristen is working in North
8 Carolina, correct?

9 A. No, there was no Kristen yet.

10 Q. Once Kristen started.

11 A. Yeah, no, at that point it was just Dave doing
12 two jobs.

13 Q. And once Kristen started as a temp, was she
14 reporting to Dave?

15 A. No. Well --

16 Q. Who did she report to?

17 A. Actually, I take that back. I don't know who
18 she was reporting to. She may have been
19 reporting to dual people when she started.

20 Q. Who else would it be other than Dave?

21 A. Andrew who she eventually ended up reporting
22 to. So eventually the decision was we need
23 help, we need somebody to do accounts payable,

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 we can't -- you know, Dave can't continue to
2 do it himself. He needs -- there is one
3 person who does the job in the whole company
4 so let's get a temporary in so we got -- we
5 brought Kristen in as a temp.

6 It was conveyed to me that, you know,
7 she was doing a great job over that -- my
8 understanding is that over the course of that
9 time they began to move the accounts payable
10 function from -- the duties from New York to
11 North Carolina and then decided that at some
12 point along the way that Kristen was -- the
13 job had been moved, all the work had been
14 moved here, and that Kristen was also -- at
15 some point along the way Kristen was doing a
16 really good job and they didn't want to lose
17 her since she was a temp, so then they
18 finished transferring the job, the work here.

19 I don't know if -- now I forgot what you
20 asked me.

21 Q. That's okay. I will move onto another
22 question.

23 Initially when Kristen was hired as a

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 about, hey, let's not have her be a temp
2 anymore?

3 A. I don't know if I got that timeline right. I
4 don't know. I'd have to look back at the
5 timeline to see. It seems like she was here a
6 couple of -- I'm not sure how long she was
7 here before we decided or they -- before
8 finance decided that they did not want to lose
9 her. She was doing such a good job.
10 Temporary, we could lose her. At the same
11 time that she was here, they decided to move
12 the work here and it has been here for the
13 last year.

14 Q. At one point you said that Dave decided to
15 move the accounts payable to North Carolina,
16 but earlier on it was a conversation between
17 Ken and finance. So I want to ask this first:
18 Is Dave a part of the finance -- Ken's finance
19 team, or was he in 2019?

20 A. First of all, if I said that, I didn't mean to
21 say that. Dave did not make the decision to
22 move that here, to move AP here. That was not
23 Dave's decision, and he did not make that

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 decision. That was Ken Boller, Ken Boller or
2 at least the finance team. He would have made
3 that decision along with members of his team
4 but that was his decision so --

5 Q. Would Andrew have had a role in that decision?

6 A. Andrew was the accounting manager. Andrew
7 reported to Brad Wilson who is the director of
8 finance who reports to Ken, so Brad would
9 have -- would have been a part of that
10 decision along with Ken. Andrew would not
11 have been a -- really would not have been a
12 decision maker. It would have been Ken and
13 Brad.

14 Dave is a part of the finance team.
15 Dave reports to Ken directly along with Brad.

16 Q. Did you have any input into that decision?

17 A. To move the position here?

18 Q. Yes.

19 A. No, that wouldn't have been my decision.

20 Q. Okay. So we were talking about discussions
21 about the move of the position that also
22 involved how it might impact Marlene. So we
23 talked about the first conversation where the

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 MR. SANDERS: We will just skip 9.

2 Thank you for catching that.

3

4 BY MR. SANDERS:

5 Q. As of September 5th, at the time of your
6 handwritten note, and September 13th or 12th,
7 the email about making her permanent, as of
8 that first part of September, what was
9 Marlene's status as you understood it?

10 A. My knowledge is that she was still out, you
11 know, on a medical leave of absence.

12 Q. Did you have any understanding at that point
13 in time as to when, if at all, she may be
14 cleared to return to work?

15 A. No.

16 Q. All right. So let's mark this as 15. It will
17 be Bates numbers 497, 498, 499.

18 All right. So do you see here that
19 Ms. Kruly sent to Lora on September 13th, she
20 says she sent some letters from her doctors?
21 Do you see that?

22 A. Yes.

23 Q. Okay. And then if we look at 498, there is a

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 letter from a doctor dated September 5
2 referencing a return to work of 12/1 and then
3 another one September 10 also saying that she
4 would not be able to return to work until
5 12/1. Do you see those there?

6 A. Yes.

7 Q. Did Lora share with you in September that
8 Marlene had provided updated medical through
9 the end of November?

10 A. Was the -- the date that Marlene sent that,
11 that was on September the 13th, that email?

12 Q. Yeah, yeah. Is that something Lora would have
13 shared with you?

14 A. I am sure that she did. I don't necessarily
15 remember when she shared it with me. Lora
16 worked part time then, but certainly she would
17 have shared that with me.

18 Q. Okay. So sometime in September, whether it
19 was the 13th or around then, Lora would have
20 told you that Marlene's current return to work
21 was not going to be before December 1?

22 A. Yes.

23 Q. Now, you were aware that Ms. Kruly's health

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 insurance was terminated sometime July 31st or
2 August 1st, correct?

3 A. Yes.

4 Q. Okay. And why is that?

5 A. That's just what happens. That's a part of
6 the process when employees don't work when
7 they're not covered under an FMLA or, you
8 know, a workers' comp situation or something
9 like that, the insurance companies don't keep
10 them covered on insurance. It's not anything
11 that Akoustis can do anything about. That's a
12 part of the insurance plan's decision.

13 Q. And why is it that Ms. Kruly was not covered
14 under FMLA?

15 A. Because the company didn't have enough
16 employees. New York didn't have -- there
17 weren't enough employees in New York. You had
18 to have, you know, 50 employees there. There
19 weren't enough employees, so we didn't have
20 that.

21 Q. And even though Ms. Kruly did not have FMLA
22 rights in terms of the continued health
23 insurance and, you know, the right to come

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 BY MR. SANDERS:

2 Q. Ms. Johnson, who is Mark Burgess?

3 A. He was the human capital advisor, HR advisor
4 at TriNet.

5 Q. And what was his role vis-à-vis your company
6 at that point in time in 2019?

7 A. Well, our company worked with TriNet. TriNet
8 was our PEO, the professional employment
9 organization, that we worked with. So we --
10 like a co-employment relationship so --

11 Q. What do you mean by "a co-employment
12 relationship"? I am sorry to interrupt you
13 there.

14 A. Yeah, that's okay. So it's like with a PEO
15 they -- they handle all of the payroll and
16 benefits and reporting and taxes and all these
17 things for us for our employees and our
18 paychecks even have TriNet on them. They
19 don't even say Akoustis. Even though you
20 would say "I work for Akoustis," you wouldn't
21 say, "I work for TriNet."

22 I have a hard time -- that's the best I
23 can -- that's how I explain PEOs as a

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~~HOLLY JOHNSON - BY MR. SANDERS - 06/09/22~~

1 professional employer organization. And they
2 usually -- usually smaller companies like to
3 work with PEOs because PEO companies will work
4 with a lot of small companies so that those
5 small companies can work -- can get a
6 better -- work together and get like a better
7 benefit option, whereas a small company can't
8 get good benefit coverage. Am I making sense?
9 I hope I am making sense here. In order to
10 get good benefits when you're a small company,
11 you know, you get terrible rates and all that
12 so a lot of times they like to work with a
13 PEO.

14 So then whenever you're tied up with a
15 PEO like we were with TriNet, you do tend to
16 consult with them on employment matters. You
17 have EPL insurance coverage with them and so
18 you have these different people/consultants
19 with them like Mark Burgess was. So we would
20 contact him about different things that we
21 would -- before we would do them.

22 Q. Got it.

23 A. To get his opinion.

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1 STATE OF NEW YORK)

2 COUNTY OF ERIE)

3
4 I, Carrie A. Fisher, Notary Public, in and
5 for the County of Erie, State of New York, do
6 hereby certify:

7 That the witness whose testimony appears
8 hereinbefore was, before the commencement of
9 their testimony, duly sworn to testify the
10 truth, the whole truth and nothing but the
11 truth; that said testimony was taken remotely
12 pursuant to notice at the time and place as
13 herein set forth; that said testimony was
14 taken down by me and thereafter transcribed
15 into typewriting, and I hereby certify the
16 foregoing testimony is a full, true and
17 correct transcription of my shorthand notes so
18 taken.

19 I further certify that I am neither counsel
20 for nor related to any party to said action,
21 nor in anyway interested in the outcome
22 thereof.

23 IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed my seal this
30th day of June, 2022.

24
25 

26 -----
27 Carrie A. Fisher
28 Notary Public - State of New York
29 No. 01FI6240227
30 Qualified in Erie County
31 My commission expires 5/02/23

DEPAOLO CROSBY REPORTING SERVICES, INC.

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
ROCHESTER DIVISION

MARLENE A. KRULY,

Plaintiff,

v.

AKOUSTIS TECHNOLOGIES, INC.,

Defendant.

Case No. 6:21-cv-06181-FPG

DECLARATION OF HOLLY JOHNSON

1. My name is Holly Johnson. I am over the age of 18 and I am competent to make the statements in this Declaration. I declare under penalty of perjury that the statements in this Declaration are true and correct to the best of my knowledge.

2. I make all statements in this Declaration based on my personal knowledge.

3. I am a resident of the state of North Carolina. I hold a North Carolina driver's license and I am registered to vote in North Carolina.

4. Defendant Akoustis Technologies, Inc. is a corporation organized under the laws of Delaware. Akoustis' headquarters is located in Huntersville, North Carolina.

5. Akoustis Technologies, Inc. is the holding company of Akoustis, Inc. Akoustis, Inc. is a Delaware corporation organized under the laws of Delaware. Akoustis, Inc.'s headquarters is located in Huntersville, North Carolina. Plaintiff, as well as all other employees of the company, are or were employed by Akoustis, Inc., not Akoustis Technologies, Inc. All references below to "Akoustis" refer to Akoustis, Inc.

6. I work for Akoustis at its headquarters in Huntersville as Director of Human Resources. I have worked there in that capacity since January 2019.

7. Akoustis employed Marlene Kruly as an Accounts Payable Specialist from October 2017 to November 2019. Kruly worked at Akoustis's facility in Canandaigua, New York, and was the company's sole Accounts Payable Specialist.

8. The decision to hire Kruly in 2017 was made in part by Thomas Sloan, formerly the Assistant Corporate Controller for Akoustis. At the time, Sloan resided in the Western District of North Carolina and worked at Akoustis's headquarters in Huntersville. He made the decision to hire her there.

9. A true and accurate copy of Akoustis's letter offering Kruly employment is attached as **Exhibit A**. It was created in Huntersville and lists Akoustis's Huntersville address on each page.

10. In March of 2019, after Kruly exhibited significant performance and attendance issues, I placed Kruly on a "development plan" with the goal of communicating Akoustis' expectations to Kruly and resulting in improved performance by her. But Kruly continued to have performance issues for the next several months until her leave of absence began in June 2019.

11. The decision to grant Kruly's June 2019 request to be placed on a leave of absence was made in combination by Dave Pettit, Lora Shealy, Ken Boller and I, all of whom worked in the Huntersville location, other than Dave Pettit.

12. The decision to separate Kruly from employment later in 2019 was made by Kenneth Boller, Akoustis's Interim CFO and Corporate Controller, as well as Lora Shealy and I. Boller resides in the Western District of North Carolina and works at Akoustis's headquarters in Huntersville. Shealy, the former Manager of Human Resources, lived and worked for Akoustis in the Western District of North Carolina at the time and through the end of her employment with

Akoustis. The decision to separate Kruly from employment was made in the Western District of North Carolina.

13. Several other employees that reside in the Western District of North Carolina and work for Akoustis in Huntersville have information relevant to this case and are expected to be witnesses in this case. These individuals include Kristen Gaines (Kruly's replacement), Shealy, and me.

14. Jennifer Barcarse is employed by Akoustis at its Canandaigua facility as an Operations Program Manager. She did not participate in the decision to terminate Kruly's employment.

15. David Pettitt is employed by Akoustis at its Canandaigua facility as Plant Financial Controller. While Pettitt was Kruly's direct supervisor when she worked for Akoustis, he did not participate in the decision to separate Kruly from employment.

16. Documents relevant to this case, including Kruly's personnel file and other information regarding her employment at Akoustis, are located at Akoustis's headquarters in Huntersville.

17. I declare under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746(2).

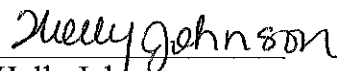

Holly Johnson

EXHIBIT A



September 27, 2017

Marlene Kruly
225 Mason Street
Canandaigua, NY 14424

Dear Marlene:

We are pleased to present the following offer of employment. This letter will summarize and confirm the details of our offer for you to join Akoustis, in the full-time position of Accounts Payable Specialist commencing on October 2, 2017 and reporting to Thomas Sloan, Assistant Corporate Controller.

In order to effectively perform in this role, the job position is based at Akoustis' Foundry located in Canandaigua, NY. You are expected to work during the core hours of 8:00 a.m. to 5:00 p.m. Monday through Friday unless otherwise communicated by your manager and approved by Human Resources.

Orientation Information: Your new employee orientation meeting will be scheduled at (time TBD) with Jennifer Barcarse on your first day of employment.

Here are the specific details of our offer:

TriNet HR Corporation: This letter and accompanying enclosure will summarize important details of matters pertaining to your employment. Please review the benefit handouts (emailed to you previously) regarding current benefits, which are provided to the workforce here at Akoustis. Our benefits, payroll, and other human resource management services are provided through TriNet HR Corporation, a professional employer organization. As a result of Akoustis' arrangement with TriNet, TriNet will be considered your employer of record for these purposes and your managers here at Akoustis will be responsible for directing your work, reviewing your performance, setting your schedule, and otherwise directing your work at Akoustis.

Compensation: Your base compensation will be \$45,000 annually paid bi-weekly, less payroll deductions and required taxes and withholdings. This is a non-exempt position and your schedule will be 40 hours per week plus pre-approved overtime as required. Your work hours will be determined by your manager. Overtime pay will be consistent with applicable law and regulations.

You will also have an annual target bonus of 10 percent of your annual salary (prorated based on your start date for the first target bonus period) if all milestones are met for Akoustis as determined by and at the discretion of our Board of Directors and subject to the provisions set forth in the Akoustis, Inc. 2016 Stock Incentive Plan.



Options to be Granted During the Next Open Trading Window: You will also be granted option for \$2,000 shares of common stock under the 2016 Plan, at an exercise price per share equal to the fair market value per share of common stock on the grant date; vesting 25% on each of the first, second, third, and fourth anniversaries of the date of grant subject to the employee's full time employment from the grant date until each vesting date and to the terms and conditions of the 2016 Plan and applicable award agreements in form established by the Compensation Committee.

Further, you will accrue on a bi-weekly basis a total of 2 weeks of paid PTO per year (during your first year) and a total of 3 weeks of paid PTO per year (during your second year and afterwards). You will also be included in the Akoustis 401K plan, that currently includes four percent company matching.

Benefits: Akoustis through TriNet, offers a full range of benefits for you and your qualified dependents as outlined in the Summary of Benefits provided to you during your interview. A presentation of our benefits program will be given to you during your first week of employment. Additional information will also be available on-line on the terms and conditions included in the Terms and Conditions Agreement (TCA) each new employee must accept in order to access TriNet's on-line self-service portal, TriNet Passport.

This offer of employment is contingent upon you fulfilling each of the following terms:

Pre Employment Screening: According to company policy, you are required to successfully complete reference, social security, drug screening, driving records and criminal background checks (the last to the extent allowed by applicable law).

Acknowledgement of Company Handbook and Confidentiality Agreement: As an Akoustis employee, you are required to follow its rules and regulations. Therefore, you will be asked to acknowledge in writing that you have read the Akoustis employee handbook and sign and comply with the attached Proprietary Information and Inventions Agreement (the "Employee Confidentiality, Proprietary Information and Patent and Invention Assignment Agreement"), which prohibits, among other things, the unauthorized use or disclosure of Akoustis' confidential and proprietary information. In order to retain necessary flexibility in the administration of its policies and procedures, Akoustis reserves the right to change or revise its policies, procedures, and benefits at any time.

Required Documentation: To comply with the government-mandated confirmation of employment eligibility, please review the enclosed I-9 Form and "Lists of Acceptable Documents" as approved by the United States Department of Justice for establishing identity and employment eligibility. Please bring the required I-9 documents with you on your first day of employment; failure to submit proof of your employment eligibility will postpone your start date or result in termination of your employment.

At Will Employment: Please understand, as stated in all job offers, Akoustis is an employment-at-will company. That means that you or the Company may terminate your employment at any time, with or without cause and with or without prior notice.

AKOUSTIS

TECHNOLOGIES

This offer letter, together with the TCA and your Proprietary Information Agreement, forms the complete and exclusive agreement as to your employment with Akoustis. It supersedes any other agreements or promises made to you by anyone, whether oral or written, regarding your employment with Akoustis. Changes to the terms of this letter require a written modification signed by an authorized employee of Akoustis.

If you wish to accept employment at Akoustis under the terms described above, please sign and date this letter and return to Jennifer Barcarse at Akoustis (jbarcarse@akoustis.com). Please retain copies for your records. This offer expires at 12 midnight on Friday, September 29, 2017.

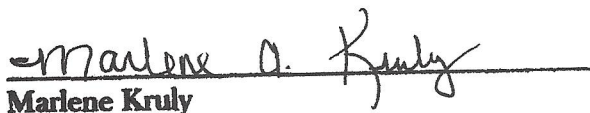
Marlene, we are excited that you are joining Akoustis' team and feel that you have a great deal to contribute. If you have any questions, please feel free to call Jen Barcarse at (585) 919-8040.

Sincerely,



Thomas Sloan
Assistant Corporate Controller

I understand and accept the terms of this employment offer.


Marlene Kruly

September 27, 2017
Date

October 2, 2017
Start Date

cc: HR

Attachments:

- Employee Confidentiality, Proprietary Information and Patent and Invention Assignment Agreement
- I-9 Form and "Lists of Acceptable Documents"

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

MARLENE A. KRULY)	
)	
Plaintiff,)	CIVIL ACTION NO.
)	<u>6:21-CV-06181 – (FPG)</u>
v.)	
)	<u>SECOND AMENDED COMPLAINT</u>
)	
AKOUSTIS TECHNOLOGIES, INC.)	<u>JURY TRIAL DEMAND</u>
)	
Defendant.)	
_____)	

Paragraph #38 is removed from the First Amended Complaint and is the only amended portion of the instant Second Amended Complaint.

NATURE OF THE ACTION

On behalf of Plaintiff Marlene A. Kruly, (referred to hereinafter as “Plaintiff” or “Marlene Kruly”) for her complaint against Akoustis Technologies, Inc. (referred to hereinafter as “Defendant” or “Employer” or “Akoustis”) states and alleges as follows:

Jurisdiction and Venue

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12117(a), which incorporates by reference Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-5(f)(1) and (3) and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. This Court has original jurisdiction over this action, and each count, pursuant to 29 U.S.C. § 2617 and 28 U.S.C. § 1331.

3. Venue of this action in the United States District Court for the Western District of New York is proper pursuant to 28 U.S.C. § 1391(b) because the Plaintiff was employed and subjected to unlawful discrimination by defendant in Canandaigua, New York in Ontario County, within the Western District of New York, and a substantial part of the events giving rise to these claims, occurred in said locale.

4. All conditions precedent to the filing of this lawsuit have been met. Plaintiff timely filed a charge of discrimination with the New York State Division of Human Rights (“NYSDHR”) (Charge number 10205318) which was dual-filed with the United States Equal Employment Opportunity Commission (“EEOC”) under Federal Charge Number 16GC000961, which resulted in a “Probable Cause Determination” pursuant to which the NYSDHR concluded “PROBABLE CAUSE exists to believe that Respondent has engaged in or is engaging in the unlawful discriminatory practice complained of.” (Determination is attached hereto as Exhibit “A”).

5. Subsequently, Plaintiff was issued a Right To Sue letter by the EEOC, which was received by Plaintiff fewer than 90 days from the date hereof (Attached hereto as Exhibit “B”) and Plaintiff files the instant Complaint within 90 days from her receipt of the “Right To Sue Letter” dated November 24, 2020.

6. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Western District of New York, Rochester Division, where Plaintiff was employed by Akoustis at all relevant times hereto.

7. The employment practices complained of herein were intentional and malicious in nature.

PARTIES

8. Plaintiff, Marlene Kruly, a female and resident of Canandaigua, New York in Ontario County, was at all relevant times hereto, an employee of Defendant Akoustis, where she began employment as an “Accounts Payable Specialist” on or about October 2, 2017 until Defendant terminated Plaintiff from her employment on November 21, 2019.

9. Defendant, Akoustis Technologies, Inc., employed Plaintiff at times relevant to this Complaint in Ontario County, New York. Akoustis is a Delaware-formed and North Carolina-based corporation operating in New York State as a “Foreign Business Corporation”, where it operates out of its Canandaigua, NY facility.

10. Akoustis describes its business on its website as follows: “...a high-tech BAW RF filter solutions company that is pioneering next-generation materials science to address the market requirements for improved RF filters - targeting higher bandwidth, higher operating frequencies and higher output power compared to incumbent polycrystalline BAW technology deployed today.”

11. Akoustis, upon information has continuously been an employer engaged in an industry affecting commerce under Section 101(5) of the ADA, 42 U.S.C. § 12111(5), and Section 101(7) of the ADA, 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(g) and (h) of Title VII, 42 U.S.C. §§ 2000e(g) and (h).

STATEMENT OF CLAIMS

12. All conditions precedent to the institution of this lawsuit have been fulfilled.

13. On December 9, 2019, Plaintiff filed a Verified Complaint with the New York

State Division of Human Rights (“NYSDHR”) alleging that Defendant unlawfully discriminated against her in the course of her employment on the basis of her disability.

14. More specifically, Plaintiff alleges that Defendant discriminatorily and intentionally failed to duly accommodate her reasonable requests for accommodation or to even engage in the required interactive process and furthermore, it targeted her for termination and in fact terminated her employment, while she was out of work on short-term disability leave for cancer treatment, shortly after Plaintiff had notified Akoustis of her return –to-work date.

15. Plaintiff went out on short-term disability leave on June 3, 2019 for cancer treatment.

16. Shortly after duly taking her medical leave, Defendant Akoustis sent Plaintiff a letter notifying her of the possibility that it would not keep her job open to her when she was ready to return to work.

17. On or about August 19, 2019, Plaintiff informed Defendant that her chemotherapy treatment was going to last longer than her Oncologist had previously expected.

18. On or about September 13, 2019, Plaintiff notified Defendant Akoustis that she would be able to return to her job as of December 1, 2019.

19. On November 19, 2019, Plaintiff Marlene Kruly provided Defendant with medical documentation highlighting her restrictions upon return to work.

20. Two days after Plaintiff Marlene Kruly submitted to her employer her anticipated restrictions for her return to work, Defendant Akoustis fired her.

21. Pouring salt in the wound of the foregoing, upon information and belief, Defendant removed Plaintiff’s health insurance coverage and life insurance coverage during her leave for cancer treatment.

22. Plaintiff, who was the Accounts Payable Specialist for Defendant, informed Defendant Akoustis of her cancer diagnosis in May of 2019.

23. Less than one month after informing Defendant of her diagnosis, in June of 2019, Plaintiff requested an unpaid leave of absence for her cancer, a qualified disability under the Americans with Disabilities Act and the New York State Human Rights Law.

24. Plaintiff had lung cancer, which affected several major life activities including temporarily impeding her ability to work during radiation and chemotherapy treatments, adversely affecting her sleep, creating anxiety and depression, creating severe fatigue and other adverse effects.

25. At the time that Plaintiff took her medical leave of absence, she did not know her expected return date because the date of her return depended upon how well she responded to her radiation and chemotherapy treatments.

26. Defendant approved of Plaintiff's "Extended Leave of Absence" in a letter dated June 13, 2019.

27. Prior to taking a Leave of Absence, Plaintiff had excelled at her job and her performance at her job was more than satisfactory.

28. In the letter dated June 13, 2019 approving of Plaintiff's leave, Defendant's Director of Human Resources actually stated in writing that Akoustis "may need to fill your position while you are out and so there is no guarantee that a position will be available upon your return."

29. Defendant failed to engage in the Required Interactive Process with Plaintiff prior to notifying Plaintiff that by virtue of her medical leave, she may well lose her job.

30. Defendant indeed hired a temporary Accounts Payable Specialist to work from its

North Carolina headquarters in order to cover Plaintiff's absence.

31. Pursuant to letter dated September 5 and September 10, 2019 sent to defendant, Plaintiff's doctors medically cleared Plaintiff to return to work as of December 1, 2019.

32. On November 5, 2019, Plaintiff's physician determined that she would require the following restrictions upon her return to work: "work hours may be limited to 30-32 hours: may be able to work from home: requires periodic rest during the day: and follow-up medical treatments will be required for the next five year."

33. Meanwhile, Defendant had canceled Plaintiff's health insurance while she remained employed by Defendant; in July of 2019.

34. Defendant also canceled Plaintiff's life insurance policy at or around the same time as the cancellation of Plaintiff's health insurance.

35. Defendant failed utterly to accommodate Plaintiff, her restrictions, or her accommodation of temporary time off even though to have done so would not have been unduly burdensome to Akoustis.

36. Plaintiff could have performed the essential functions of her position with accommodation had Defendant offered to accommodate her, which it failed to do.

37. There is a temporal proximity between Plaintiff's disability and leave, and her termination from employment insofar as Plaintiff was fired during her authorized medical leave, less than 10 days prior to Plaintiff's anticipated return to work, about which Defendant had been apprised.

38. Notably, in its investigatory Findings, the DHR concluded that "Probable Cause exists to believe that the Respondent (Akoustis) has engaged in or is engaging in the unlawful discriminatory practice complained of." (Exhibit "A").

39. But for Plaintiff's lung cancer diagnosis, Defendant would not have terminated Plaintiff Marlene Kruly's employment.

40. Defendant failed utterly to engage in the required interactive process in terms of exploring ways in which Plaintiff could have been accommodated.

41. Plaintiff duly performed the essential functions of her position at all times relevant hereto despite her battle with cancer, and she could have performed the essential functions of her position had Defendant engaged in the interactive process with her, but Defendant chose instead to summarily terminate a valuable employee, simply because she was ill with a serious ADA-qualified disability.

42. At the time of her termination from employment, Plaintiff was suffering from symptoms of her disability and treatment, all of which Akoustis was actually aware of, but affirmatively chose to ignore.

43. Had Defendant even tried to work with Plaintiff, Plaintiff hereby asserts that she could have continued gainful employment at Akoustis, and that such accommodation would not have posed an undue burden upon Defendant.

44. Plaintiff suffered severe emotional distress as a direct and proximate cause of her termination from employment, for which he is entitled to relief in an amount to be proven at or before trial, which amount exceeds the jurisdictional minimum amount required to be in controversy in the present court.

45. Plaintiff suffered actual monetary damages in the form of lost wages following her termination from employment for which she is entitled to relief.

46. Notwithstanding that Plaintiff has satisfied her duty to mitigate her damages by exercising a good faith effort to mitigate, those damages continue to accrue and are expected to

be well into the six figures.

47. Plaintiff's costs, including include attorneys' fees continue to accrue.

48. The present Complaint shall have been filed in the Federal District Court, Western District of New York, fewer than 90 days after receiving the Right To Sue letter from the Equal Employment Opportunity Commission.

49. Plaintiff hereby incorporates by reference each and every allegation and averment made above as though fully set forth herein.

50. As a direct and proximate result of Defendant's discrimination against Plaintiff, Plaintiff has suffered damages in an amount to be determined at trial, including, but not limited to, the loss of her career at Akoustis, lost wages, lost promotion opportunities, related fringe benefits, and other forms of compensation, as well as loss of career opportunity and advancement, in amounts yet to be determined at or before trial

51. Defendant Akoustis acted in a decidedly callous manner when it cast aside one of its own; a hard-working woman who happened to be afflicted with a serious form of cancer with when it failed to accommodate her reasonable requests for accommodation, failed to engage her in the interactive process, shunned her, excluded her, ignored her medically-backed pleas for assistance, and ultimately FIRED her, causing her to lose her income that she depended on, while at her absolute weakest point and at precisely the worst possible time.

COUNT I:

Disability Discrimination - Title I of the Americans with Disabilities Act of 1990 ("ADA").

By failing to engage in the Required Interactive Process with Plaintiff in regards to her anticipated return to work following Lung Cancer treatment, by cancelling Plaintiff's benefits, including but not limited to health insurance and life insurance while Plaintiff was on an authorized medical leave from her employment at Akoustis, so that she could obtain treatment for her Lung Cancer, and by terminating Plaintiff's employment during her authorized medical leave to treat her ADA Qualified condition of Cancer, only approximately 10 days prior to her anticipated return to work following cancer treatment, Defendant discriminated against Plaintiff in violation the ADA.

COUNT II:

Disability Discrimination - N.Y. Exec. Law, art. 15 (New York State Human Rights Law).

By failing to engage in the Required Interactive Process with Plaintiff in regards to her anticipated return to work following Lung Cancer treatment, by cancelling Plaintiff's benefits, including but not limited to health insurance and life insurance while Plaintiff was on an authorized medical leave from her employment at Akoustis, so that she could obtain treatment for her Lung Cancer, and by terminating Plaintiff's employment during her authorized medical leave to treat her ADA Qualified condition of Cancer, only approximately 10 days prior to her anticipated return to work following cancer treatment, Defendant discriminated against Plaintiff in violation New York State Human Rights law prohibiting discrimination in employment on the basis of disability.

PRAYER FOR RELIEF

Wherefore, the Plaintiff respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Employer, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with it, from mistreating, or terminating qualified individuals from employment, or discriminating against employees due to disability.

B. Order Defendant Employer to institute and carry out policies, practices, and programs which provide equal employment opportunities to all employees, and which protect employees from unlawful discrimination on the basis of disabilities.

C. Order Defendant Employer to make whole Marlene Kruly by providing appropriate back pay, with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.

D. Order Defendant Employer to make whole Marlene Kruly by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described herein-above, in amounts to be determined at trial.

E. Order Defendant Employer to make whole Marlene Kruly by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices, including the discrimination complained of herein-above, which caused emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.

F. Order Defendant Employer to pay punitive damages as a result of the malice and intentional nature of the discrimination alleged herein, so as to punish Defendant for its knowing discrimination and violation of the law, to the detriment of Plaintiff and Plaintiff's career.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

JURY TRIAL DEMAND

The Plaintiff requests a jury trial on all questions of fact raised by its complaint.

Respectfully Submitted,

S:// James D. Hartt
JAMES D. HARTT, ESQ.,
Attorney For Plaintiff-Admitted to
Practice in WDNY Federal Court
6 North Main Street, Suite 200F
Fairport, NY 14450
Telephone: (585) 490-7100
Fax: 1 (716) 299-2006

ORIGINAL of the foregoing was
filed this 9th Day of February 2022 with:
The Clerk of the Federal District Court
Western District New York District, Rochester Division

EXHIBIT 4



9805 Double R Boulevard, Ste. 200
Reno, Nevada 89521-2946
Phone 800.638.0461
Fax 510.352.6480
www.trinet.com

June 19, 2019

Marlene Kruly
225 Mason St
Canadaigua, NY 14424

RE: Family Medical Leave Act (FMLA) Notice of Eligibility and Rights & Responsibilities

Dear Marlene Kruly,

On June 13, 2019 you informed us that you needed leave beginning on June 3, 2019 due to a serious health condition.

Part A – Notice of Eligibility

This Notice is to inform you that you:

- ☐ Are eligible for FMLA leave. (See Part B below for Rights and Responsibilities)
- ☒ Are not eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):
 - ☐ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately _____ months towards this requirement.
 - ☐ You have not met the FMLA's 1,250-hours-worked requirement.
 - ☒ You do not work and/or report to a site with 50 or more employees within 75-miles.
 - ☐ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

Part B – Rights and Responsibilities

In order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us within 15 days of receipt of this notice. If sufficient information is not provided in a timely manner, your leave may be denied or delayed, and you may be subject to disciplinary action, up to and including termination of employment, for excessive absences. Leave of Absence Medical Certification information you provide to TriNet may be provided to your Akoustis Inc. (hereinafter referred to as your "Worksite Employer") upon request of an authorized worksite representative.

- ☐ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ☐ is/ ☐ is not enclosed.
- ☐ Sufficient documentation to establish the required relationship between you and your family member.

If you are qualified for FMLA leave, you will have the following **rights** while on leave:

- You will generally have a right for up to 12 weeks of unpaid leave in a 12-month period calculated as a "rolling" 12-month period measured backward from the date of any FMLA leave usage.
- You will have a right for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered service member with a serious injury or illness. This single 12-month period commenced on Date (If applicable).
- Your health benefits will be available for up to 12 weeks of any such qualifying leave under the same conditions as if you continued to work. For any period of leave beyond 12 weeks, your health benefits will be available only through COBRA. See above about your responsibilities regarding continuation of your health benefits.

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- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you are using any paid leave, it will run concurrently with your FMLA leave. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

You will have the following **responsibilities** while on leave:

- ☐ If you are approved for FMLA and if you have not returned to work after leave, then your active benefits will terminate and you will become eligible for COBRA and you will be advised of your COBRA rights via a separate mailing.
- ☒ Contact your worksite employer to make arrangements to continue to make your share, if any, of the premium payments on your health insurance to maintain health benefits while you are on leave. If you normally pay a portion of the premiums for your health insurance, these payments will still need to be made during the period of leave. Your Worksite Employer will pay its normal share and will be invoiced for your share of the benefit premiums. Your Worksite Employer may require that you pay for your share of any benefit premiums either through a payment agreement or other arrangement. If payment is not timely made, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at its option, your Worksite Employer may pay your share of the premiums during leave, and recover these payments from you upon your return to work. If you do not return to work following leave for a reason other than (i) the continuation, recurrence, or onset of a serious health condition which would entitle you to leave, (ii) the continuation, recurrence, or onset of a covered service member's serious injury or illness which would entitle you to leave, or (iii) other circumstances beyond your control, you may be required to reimburse your Worksite Employer for health insurance premiums paid on your behalf during your leave.
- ☒ If a portion of your paycheck normally goes to pay for certain voluntary benefits such as additional GVUL life or AFLAC, you may need to make payment directly to the providers of these benefits during your leave, assuming you wish to continue these benefits during your leave. If you need contact information, refer to login.trinet.com or call the TriNet Solution Center at 800.638.0461.
- ☒ During your leave you will be required to furnish us with periodic reports of your status and intent to return to work every 30 days. If the circumstances of your leave change and you are able to return to work earlier than the date indicated, you will be required to notify your Worksite Employer at least two work days prior to the date you intend to report for work. You may also be required to furnish recertification relating to a serious health condition.
- ☒ You may be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work will be delayed or may be denied if the certification is not provided within the required time period.

You will be given notice if the requested time off will be designated as FMLA leave once you have provided the requested information. In the meantime, it will be provisionally designated as such. We want to ensure that you understand your rights and responsibilities under FMLA. If you have general questions, please contact the TriNet Solution Center at 800.638.0461, 5:00 a.m. to 6:00 p.m. PT, Monday through Friday. A representative will be happy to assist you.

Sincerely,

TriNet Leave of Absence Center of Excellence

FOR TRINET USE ONLY	Processor: TG
---------------------------	---------------



6/19/2019

Marlene Kruly
225 Mason St
Canadaigua, NY 14424

RE: Your Leave of Absence

Dear Marlene Kruly,

We have been notified of your request for a leave of absence (LOA or leave) beginning on **6/3/2019**. If you are granted an extended LOA which is not covered under a federal, state, or local leave law, your TriNet benefits eligibility will continue as if you are an active worksite employee for 30 days following your last day worked or last day of PTO, vacation, or sick hours used in lieu of hours worked. After those 30 days, your benefits coverage will continue until the end of the month in which the 30th day occurs.

Based on our initial review of the LOA submission details provided to us by your worksite human resources representative, we estimate that your LOA **may not** be covered under a federal, state, or local leave law. Additional information may be enclosed or provided separately to notify you of your rights and responsibilities associated with the applicable leave law.

If you and your covered dependents are no longer eligible for health care coverage through the TriNet Plan, under certain circumstances you/they may be eligible to continue coverage under the Federal Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985. Please refer to the TriNet Benefits Guidebook and Summary Plan Description for more information related to COBRA continuation coverage.

Keep your Worksite Employer Informed

While on your LOA, provide your worksite employer with periodic reports of your status and intent to return to work. If you are able to return to work earlier than anticipated, or if your LOA needs to be extended, you are required to provide advance notice to your worksite employer. In addition, if your LOA is due to your own serious illness, you must provide updated medical information to extend your LOA or provide a medical release upon your return to work. If you return to work with limitations or need follow-up care, be sure to discuss this with your worksite employer.

Wage Replacement Options

TriNet Disability Benefits (Short-Term or Long-Term Disability)

TriNet disability insurance provides you with partial income when you are unable to work due to an eligible illness or injury.

To confirm that you are enrolled in TriNet disability coverage, log in to TriNet at login.trinet.com, then click **Benefits > Overview** and look for **Short-Term Disability** and **Long-Term Disability**. To apply for disability benefits, contact Aetna directly at 866.825.0184. Weekly and monthly maximums, elimination periods, waiting periods, and other rules exist and should be discussed with Aetna directly, or refer to the Carrier Certificates located on login.trinet.com > **Benefits > Carriers**.

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There are two TriNet disability plans:

Short-Term Disability (STD) is for a temporary disability due to an eligible non-occupational illness or injury or an eligible disabling pregnancy-related condition.

Long-Term Disability (LTD) can provide coverage when a six-month period has elapsed since the onset of the eligible disabling condition. The covered conditions may be occupational or non-occupational and can be the result of illness, injury, or related to a disabling pregnancy.

Eligibility for disability benefits will be determined solely by Aetna in accordance with its underwriting guidelines. If you are deemed by Aetna to be disabled, benefits will be calculated according to the language found within the applicable Carrier Certificate. TriNet cannot and does not influence or affect Aetna's determination in any way.

Please refer to the Disability Insurance section of the TriNet Benefits Guidebook and the Carrier Certificates for additional information.

State Disability Insurance (SDI)

SDI is partial wage-replacement insurance for workers in California, Hawaii, New Jersey, Puerto Rico, and Rhode Island. If you work in one of those locations, other than Hawaii, you should submit a claim directly with the applicable state. If you work in Hawaii, you must apply by contacting Aetna at 866.825.0184. Please let them know that you are initiating a Hawaii state disability claim.

New York State Disability Benefits (DBL) and Paid Family Leave (PFL)

If you *work* in the State of New York and wish to apply for DBL, your New York DBL claim form should be in this LOA Packet. If you wish to file for PFL, you must initiate the claim by completing the employee portion of the PFL claim form. The PFL claim form can be found on the carrier's website at: www.sslicny.com.

If you are approved for SDI/DBL benefits in addition to TriNet STD or LTD benefits, it is your responsibility to immediately notify Aetna at 866.825.0184. Your TriNet disability benefits will be reduced by your SDI/DBL payments. **Failure to notify Aetna in a timely manner of your receipt of SDI/DBL benefits may result in overpayments, which may either reduce your future disability payments or require you to repay the carrier.**

Please note, all SDI/DBL claims are approved, paid, and processed directly by the applicable state disability office or carrier, not by TriNet. Please contact the applicable state disability office or carrier for further assistance.

Your TriNet Benefits While You Are on Leave

The following is a summary of what you can expect with regard to your TriNet benefits while you are on an LOA. Please refer to the TriNet Employee Handbook, TriNet Benefits Guidebook, and Summary Plan Description for more information related to your benefits while on an LOA.

If you are granted an extended LOA that is not covered under federal, state, or local leave laws, your benefits coverage will continue as if you are an active worksite employee for 30 days following your last day worked. After those 30 days, coverage will continue until the end of the month in which the 30th day occurs.

If your benefits terminate while you are on leave:

Flexible Spending Account (FSA) While on Unpaid LOA Health Care FSA While on Paid LOA

If you go on a paid LOA that provides for continuation of your TriNet health benefits, your health care FSA participation will continue and eligible expenses you incur after the start of your paid leave are eligible for reimbursement. Benefits plan year payroll deductions will continue during paid leave.

Health Care FSA While on Unpaid LOA

If you go on an unpaid LOA that provides for continuation of your TriNet health benefits, you have the following choices regarding your health care FSA.

1. Your health care FSA participation will continue and your payroll contributions will be on hold status unless you notify TriNet that you elect one of the options listed below. Eligible expenses you incur after the start of your unpaid LOA are eligible for reimbursement. Upon your return to work, your FSA payroll contributions will resume if you return to work in the same benefits plan year. Your remaining benefits plan year payroll contributions will be adjusted to make up for the contributions you missed during your unpaid leave.
2. You may submit a Life Status Change (LSC) form to elect to stop your health care FSA participation and contributions. Expenses you incur after the start of your unpaid LOA will not be eligible for reimbursement. Upon your return to work, your FSA payroll contributions will resume if you return in the same benefits plan year. Your annual health care FSA election will be reduced by the total amount of payroll contributions you missed during your unpaid leave.
3. You may notify TriNet that you would like to contribute through a lump sum pre-tax salary reduction payment before your unpaid LOA commences and continue to incur eligible expenses during your leave. This option is only available with an advance 30-day notice prior to the commencement of your LOA date. Upon your return to work, your FSA payroll contributions will resume if you return in the same benefits plan year. Your remaining benefits plan year payroll contributions will be adjusted to account for your lump sum contribution.
4. You may notify TriNet that you would like to continue after-tax contributions by sending personal checks or money orders to TriNet during your LOA. You may continue to incur eligible expenses during your unpaid LOA. Your remaining benefits plan year payroll contributions will be adjusted to account for your post-tax contributions. Please keep in mind if you elect this option you will lose the pre-tax advantages for contributions submitted during your unpaid leave.

If you go on an unpaid LOA that does not provide for continuation of your TriNet health benefits, you will be offered COBRA continuation coverage. While on LOA, you can continue after-tax contributions through COBRA. If your unpaid LOA lasts more than 30 days, you may submit a new health care FSA election when you return to work.

Dependent Day Care FSA While on LOA

If you elected dependent day care FSA, day care expenses you incur after the first two (2) weeks of your period of paid or unpaid LOA are not eligible for reimbursement. If you are on paid LOA, benefits plan year payroll deductions will continue during the paid LOA unless you submit an LSC form to stop your dependent day care FSA participation. If you are on unpaid LOA, upon your return from leave you will be automatically re-enrolled in dependent day care FSA and your remaining payroll contributions will be recalculated and increased to make up for the contributions you missed during your unpaid LOA so that your total FSA election will equal what you originally elected for the year.

Health Savings Account (HSA)

It is your responsibility to manage and monitor your HSA. Please contact your HSA bank for specific questions related to contributions during your LOA. You may enroll in an HSA or change or stop your HSA deductions at any time during the year. The Employee Payroll Deduction Authorization Form is available on login.trinet.com by selecting **Company > Forms and Policies > Payroll Forms**. Your HSA election is for the benefits plan year. If you start or change your HSA payroll contributions after the plan year begins, consider that you are making a partial year election.

Medical, Dental, and Vision Plans

You will receive a COBRA notice and you must timely elect and pay for COBRA coverage if you want to continue benefits during your LOA.

Basic, Supplemental, Spouse/Partner, and Child Life Insurance

The insurance carrier only allows 31 days after the termination of benefits for you to continue your basic life insurance or supplemental life insurance coverage for yourself, your spouse/domestic partner, or your child(ren). If your LOA results in the termination of life insurance benefits, pursuant to MetLife rules, MetLife must receive a completed conversion or portability application form from you within 31 days after the date your life insurance ends. You are solely responsible for meeting this deadline if you wish to continue your policy. Contact MetLife directly at 877.275.6387 for basic and supplemental life insurance conversion information or 888.252.3607 for supplemental life insurance portability information.

Life Status Change (LSC) Events

If you have an LSC event while you are on an approved LOA, report it to TriNet within 30 days (60 days for a birth, adoption, or State Children's Health Insurance Program event). If you are on COBRA, slightly different rules may apply.

Return to Work

Return to Work Within 30 Days of Your Benefits Termination

If you return to work within 30 days of your benefits termination, and unless you elected TriNet COBRA, your prior elections under the Plan will be reinstated retroactive to the date your benefits terminated, and you will be responsible for any premiums due. Repayment will be collected via payroll deductions unless you made other arrangements with your worksite employer.

Return to Work More Than 30 Days after Your Benefits Termination

If you return to work more than 30 days after termination of your benefits, you will be automatically enrolled into the health plans you had prior to the termination of your benefits and given the opportunity to make changes or re-elect health, life, and FSA benefits within 30 days of your return to full-time regular work.

For additional assistance, please contact the TriNet Solution Center at 800.638.0461, Monday–Friday 4:30 a.m.–9 p.m. PT.

Sincerely,

TriNet Leave of Absence Center of Excellence

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

MARLENE A. KRULY,) CIVIL ACTION NO.
6:21-CV-06181-(FPG)
)
Plaintiff,
) VIDEOCONFERENCE
DEPOSITION
- vs -) OF:
) MARLENE A. KRULY
AKOUSTIS TECHNOLOGIES, INC.,
)
Defendant.)

TRANSCRIPT of the stenographic notes of
the proceedings in the above-captioned matter, as
taken by and before BARBARA A. BRADEY, a Certified
Court Reporter and Notary Public of the State of
New Jersey, held remotely via ZOOM
VIDEOCONFERENCING, with the Witness appearing from
her residence in Canandaigua, New York, on Friday,
February 11, 2022, commencing at 10:01 a.m.

1 A Yes.

2 Q And who did you interview with?

3 A Jennifer Barcarse was one of them;
4 Kelly McMahon; Thomas Sloan. And I believe that
5 was it.

6 Q And who is Jennifer Barcarse?

7 A At the time, she was the office
8 manager.

9 Q And who is Kelly McMahon?

10 A She was purchasing agent.

11 Q And who is -- I believe it was
12 Thomas Sloan?

13 A Yes, he was a former assistant
14 controller for the North Carolina office.

15 Q And the position you were applying
16 for, was it in North Carolina?

17 A No, it was in Canandaigua, New
18 York.

19 Q And after you interviewed for the
20 position with these three individuals, were you
21 offered a position with the company?

22 A Probably a few days later, I was.

23 Q And what position were you
24 offered?

25 A Accounts payable specialist.

1 Q And was this a full-time role?

2 A It was.

3 Q And were you an at-will employee?

4 A Yes.

5 Q What is your understanding of what
6 it means to be an at-will employee?

7 A That either the employee or the
8 employer can terminate the position with no
9 specific reasons given.

10 Q And when you were hired by
11 Akoustis as the accounts payable specialist, were
12 you the only accounts payable specialist, or were
13 there a number of individuals in that role?

14 A I believe there was another
15 individual in the North Carolina office that
16 worked on a part-time basis.

17 Q And at some point -- did that
18 remain the case throughout your employment with
19 Akoustis?

20 A It did for a short period of time
21 and then the role fully transferred to
22 Canandaigua.

23 Q Do you recall around what time
24 that was?

25 A What time what was?

1 Q That the role fully transferred to
2 the Canandaigua office.

3 A It was in 2018. I can't remember
4 the month exactly.

5 Q So at some point in 2018, you were
6 the only person doing accounts payable work for
7 the company?

8 A Yes.

9 Q Who did you report to when you
10 were first hired by the company?

11 A Thomas Sloan. And there was
12 another -- there was another woman. I can't
13 remember her last name, but it was Cindy. She was
14 the CFO at the time.

15 Q Did there come a time where that
16 changed, who you reported to?

17 A Eventually, yes.

18 Q And when did that change?

19 A I believe it was January of 2018.

20 Q And starting in or around January
21 of 2018, who did you report to?

22 A Dave Pettitt.

23 Q Had you worked with Dave Pettitt
24 prior to that time?

25 A I had not.

1 Q Was Dave Pettitt new to the
2 company?

3 A Yes, he was.

4 Q And what was his position?

5 A Controller.

6 Q Was he also located in the
7 Canandaigua office?

8 A He was.

9 Q Can you describe for me the duties
10 and responsibilities that you had as an accounts
11 payable specialist?

12 A I would receive invoices for the
13 Canandaigua office. Then I would receive some
14 invoices from the North Carolina office prior to
15 it actually switching over to full-time. They
16 were to be scanned, they were to be entered into
17 the computer software system. Just basically
18 keeping things pretty much paid up and dealing
19 with vendors pretty much on a daily basis, dealing
20 with purchasing, dealing with the shipping
21 department.

22 Q When you say, "dealing with
23 purchasing," what do you mean by that?

24 A Well, sometimes there would be
25 conflicts for purchasing if there was a -- if

1 Canandaigua office.

2 Q And you said you were also dealing
3 with vendors. In what way? Can you describe for
4 me what you would do to deal with vendors?

5 A Sure. They wanted to know when
6 their payment was expected; or they hadn't
7 received a check; if invoices were incorrect. It
8 pretty much was a constant communication with a
9 variety of vendors that we dealt with.

10 Q And these job duties and
11 responsibilities that you just described, were you
12 the only person at Akoustis who was responsible
13 for performing those duties?

14 A Yes.

15 Q I'm going to show you another
16 document. We will mark it Exhibit 5. Give me one
17 second.

18 MS. WIESELTHIER: And for the
19 record, this is a document bearing production
20 numbers Akoustis-Kruly 305 to 306.

21 (Exhibit 5, Job description, was
22 presented to the witness via screen share.)

23 Q Do you recognize this document?

24 A I do.

25 Q What is this document?

1 not -- mine originally did not mention excellent
2 time management, exceptional organization skills
3 and prioritize large volumes of work. It was not
4 mentioned about the ability to effectively
5 communicate with managers, finance/accounting
6 staff, and vendors on a daily basis. I don't
7 recall that verbiage, to be honest with you.

8 Q And when you say that you don't
9 recall that verbiage under the qualifications,
10 would you agree that those were parts of your job
11 duties or essential to your duties as an accounts
12 payable specialist? For example, having
13 organizational skills, effectively communicating.

14 A Of course.

15 Q Great.

16 And you had pointed out the high
17 volume of invoices. When you were the accounts
18 payable specialist, would you consider yourself to
19 have handled a high volume of invoices as part of
20 your job duties and responsibilities?

21 A Yes.

22 Q And these job duties and
23 responsibilities that you had as an accounts
24 payable specialist, they required you to be in the
25 office to perform, correct?

1 A Yes.

2 MR. HARTT: Sorry. Sarah, can we
3 go back to that exhibit and can you just scroll
4 down for purposes of seeing the complete document?

5 MS. WIESELTHIER: Oh, sure. You
6 want to see the second page?

7 MR. HARTT: Yes.

8 MS. WIESELTHIER: Sure.

9 MR. HARTT: And is that where it
10 ends?

11 MS. WIESELTHIER: Yep.

12 MR. HARTT: Okay.

13 THE WITNESS: And if you don't
14 mind me saying, the compensation was never on my
15 initial --

16 MS. WIESELTHIER: That's fine. I
17 was just asking about your duties and
18 responsibilities, not necessarily if this was the
19 precise document that you had when you started.
20 Thank you for that clarification.

21 MR. HARTT: Thank you.

22 Q Were you aware that while you were
23 an employee -- let me strike that.

24 While you were an employee of
25 Akoustis, were you aware that they had any

1 Q When exactly did you start working
2 for Akoustis as an accounts receivable specialist?

3 A October 2, 2017.

4 Q At sometime shortly after you
5 started, did you require a leave of absence for a
6 medical issue?

7 A Shortly after I started? No, not
8 shortly after I started. The only time I required
9 a leave of absence was in 2019.

10 Q You don't recall having to take
11 some time off in or around November or December of
12 2017 or January of 2018?

13 A I don't recall that.

14 Q No? Okay.

15 I'm going to show you a document
16 we'll mark as Exhibit 7. It has production number
17 Akoustis-Kruly 54.

18 (Exhibit 7, Letter to Ms. Kruly
19 from Ms. Shealy, dated 11/29/17, was presented to
20 the witness via screen share.)

21 Q Do you recognize this document?

22 A Yes.

23 Q Okay. And in the first paragraph
24 of the document, it says, "Please have your
25 medical provider review the attached medical

1 training was, how often it was, how many hours it
2 was?

3 A Pretty much four days a week, an
4 hour or two a day.

5 Q And you said you completed that
6 training?

7 A I didn't complete it because I was
8 ill at the time.

9 Q So at some point while you were
10 going through the training sessions, you were ill?

11 A I was.

12 Q So you didn't get to complete it
13 because you were subsequently out of work; is that
14 correct?

15 A That is correct.

16 Q So other than the complaints that
17 we've discussed thus far, do you recall having
18 made any other complaints about Dave Pettitt
19 during your course of employment with Akoustis?

20 A Not that I'm aware of.

21 Q Did you ever make any complaints
22 to the hotline?

23 A No.

24 Q Did you ever make any complaints
25 to TriNet?

1 A No.

2 Q Do you know what TriNet is?

3 A I do.

4 Q And what is TriNet?

5 A TriNet was Akoustis' HR platform.

6 Q At what point did you become ill
7 and start missing work? Or sorry. Become ill and
8 start needing to take time off from work.

9 A Actually, I started feeling ill in
10 January of 2019.

11 Q Did it affect your ability to work
12 at that time in January 2019?

13 A I didn't feel well a lot of the
14 time.

15 Q Did it affect your ability to
16 perform your job duties and responsibilities as an
17 accounts payable specialist?

18 A I was there. I mean, I did the
19 best that I could.

20 Q Did you inform anyone in January
21 2019 that you were feeling ill?

22 A Yes.

23 Q Who?

24 A I believe I told Dave, I told Jen,
25 I told Kelly.

1 Q And who was Kelly?

2 A Kelly McMahon, purchasing agent.

3 Q What specifically did you tell
4 Dave?

5 A I told him that I didn't feel
6 well, I didn't know what was going on, but I
7 wasn't feeling up to par.

8 Q Did you share anything else at
9 that time in January 2019?

10 A Not that I recall.

11 Q What did you tell Jen at that
12 time?

13 A Pretty much the same thing.

14 Q And what about Kelly, the same
15 thing?

16 A Yes.

17 Q And what was their response?

18 A I don't recall.

19 Q At what point did you start
20 missing work?

21 A I don't recall specifically, but
22 if I had started feeling ill in January I would
23 assume that there were times in January.

24 Q Did you have paid time off
25 available for those absences?

1 A Some I did, yes. And then I used
2 up some of them -- I used up most of them. So the
3 rest of the time I took with no pay.

4 Q And Akoustis permitted you to take
5 the unpaid days off, correct?

6 A Yes.

7 Q When was the last day that you
8 physically worked at Akoustis?

9 A I believe it was towards the end
10 of May of 2019.

11 Q And what exactly were the health
12 issues that you were experiencing starting in
13 January of 2019?

14 A Severe pain in my upper chest.
15 Just overall not feeling well.

16 Q Was there a time when you were
17 diagnosed with vertigo?

18 A Yes.

19 Q And when was that?

20 A I believe that was in May of 2019.
21 Actually, it was considered a vestibular
22 disturbance.

23 Q And did you share your diagnosis
24 of vestibular disturbance or vertigo with anyone
25 at Akoustis?

1 A I did.

2 Q And who did you share it with?

3 A I shared it with Dave, I shared it
4 with Jen, I shared it with Kelly.

5 Q And when did you share it with
6 Dave?

7 A One of the days that I couldn't
8 come in because I couldn't drive. I don't
9 remember the exact date.

10 Q Was it in May of 2019,
11 approximately?

12 A I believe that it was, yes.

13 Q And what was his response?

14 A I don't recall.

15 Q You were permitted to take that
16 time off from work?

17 A Yes.

18 Q And when did you inform Jen of
19 your diagnosis of vestibular disturbance?

20 A It was sometime in May.

21 Q Can you tell me your discussion
22 with Jen?

23 A I don't recall it.

24 Q Well, you must have told her that
25 you had this diagnosis, correct?

1 A Yes, but I don't remember the
2 exact conversation.

3 Q Okay. And do you remember what
4 her response was?

5 A I do not.

6 Q What about your discussion with
7 Kelly, when did that take place?

8 A Probably around the same time.

9 Q Do you recall your discussion with
10 Kelly?

11 A I do not.

12 Q When you stopped working in May of
13 2019, was it because of the vertigo or the chest
14 pain?

15 A It was both.

16 Q And so can you describe to me --
17 strike that.

18 With regard to the chest pain, did
19 you undergo any -- did you receive any diagnosis
20 or undergo any treatment while you were an
21 employee of Akoustis?

22 A Well, initially, in February of
23 2019, I went to the emergency room on a weekend.
24 I believe it was February 6th.

25 Q And did you leave the emergency

1 time that the initial diagnosis was missed, which
2 was in February. So April, there was a pretty
3 good indication of what it was. The exact
4 diagnosis did not occur until I believe it was May
5 of 2019. And that was after numerous tests had
6 been taken.

7 Q And did you require time off from
8 work to undergo some of these tests?

9 A Absolutely.

10 Q And Akoustis provided you with
11 that time off?

12 A Yes.

13 Q Do you recall specifically
14 advising Akoustis of your cancer diagnosis?

15 A I don't remember the exact date,
16 but I do remember having a face-to-face
17 conversation with Dave. I also spoke with Jen. I
18 also spoke with Mary Winters.

19 Q And who is Mary Winters?

20 A Vice-president of fab operations.

21 Q Do you recall any specific details
22 of your discussion with Dave about the diagnosis?

23 A Not specific, no.

24 Q Do you recall any specific details
25 of your discussion with Jen about the diagnosis?

1 A Well, I would assume that if a
2 change of venue had been granted, then I would be
3 expected to go to North Carolina to do whatever
4 legalities were necessary. And this was my
5 doctors saying that that was not advisable.

6 Q Understood.

7 Now, did there come a time when
8 you requested a formal leave of absence from the
9 company?

10 A Yes.

11 Q And when was that?

12 A I believe it was effective June
13 3rd of 2019.

14 Q And how did it come about that you
15 requested a formal leave of absence?

16 A Could you be more specific,
17 please?

18 MR. HARTT: Form.

19 Q Sure. Did anybody direct you to
20 request a formal leave of absence?

21 A I believe it was discussed between
22 Jennifer Barcarse and me. I asked her what I
23 needed to do since I was going to be undergoing
24 treatment.

25 Q And Jen advised you to request a

1 formal leave of absence?

2 A She did.

3 Q Did you work with anybody in human
4 resources to request a formal leave of absence?

5 A I filled out the paperwork and I
6 believe that Jen Barcarse forwarded it on to HR.

7 Q Give me one moment. I'm just
8 pulling up some documents.

9 THE WITNESS: Is Mr. Hartt still
10 with us?

11 MR. HARTT: Can you not see me?

12 THE WITNESS: Oh, I can now. But
13 I couldn't before. In the little frame, I
14 couldn't, but --

15 MR. HARTT: Oh, I am. Yes.

16 THE WITNESS: Okay.

17 Q I'll show you a document we'll
18 mark as Exhibit 14. It bears production numbers
19 Akoustis-Kruly 406 to 408.

20 MS. WIESELTHIER: For the record,
21 406, 407, 408.

22 (Exhibit 14, Extended Leave of
23 Absence Request, was presented to the witness via
24 screen share.)

25 Q Ms. Kruly, do you recognize this

1 document?

2 A I do.

3 Q And what is it?

4 A It's the request for a leave of
5 absence.

6 Q Okay. And did you complete this
7 form?

8 A I did.

9 Q Is this the form that you just
10 testified about in terms of the leave of absence
11 request that you submitted?

12 A Yes.

13 Q Let's go back to the top and I'll
14 go more slowly.

15 Did you have an end date for when
16 the leave of absence was being requested for?

17 A Not that I recall.

18 Q And, in fact, in this -- towards
19 the top of the document bearing production number
20 Akoustis-Kruly 406, it says, "Date of leave. I'm
21 requesting a leave of absence beginning on June 6,
22 2019 and ending on," and the line is blank,
23 correct?

24 A Yes.

25 Q So at the time you requested a

1 leave of absence, did you not have an anticipated
2 return-to-work date?

3 A I did not.

4 Q Did your doctor provide you with
5 any indication of how much time off from work you
6 would need?

7 A At that point in time, no.

8 Q And did Akoustis grant this leave
9 of absence request?

10 A Yes.

11 Q I'll show you another document.
12 We'll mark it as Exhibit 15.

13 You know what? Hold on. Before I
14 do that, when you took -- when you were approved
15 for a leave of absence, you were advised that it
16 was an unpaid leave of absence, correct?

17 A Yes.

18 Q Because you didn't have any paid
19 time off available to you, right?

20 A Yes.

21 Q And were you also advised that it
22 was not a job-protected leave of absence?

23 A I was told that my job may not be
24 there.

25 Q And who told you that?

1 A Holly Johnson.

2 Q Did you have a phone call with her
3 or an in-person meeting where she explained that
4 to you?

5 A No, it was done via email, a
6 letter.

7 Q Now I'm going to show you a
8 document we'll mark as Exhibit 15, which has
9 production number Akoustis-Kruly 425.

10 (Exhibit 15, Letter to Ms. Kruly
11 from Ms. Johnson, dated 6/13/19, was presented to
12 the witness via screen share.)

13 Q Is this the letter that you're
14 referring to?

15 A Yes.

16 Q And in the letter, Holly Johnson
17 advised you, "Although your leave of absence
18 request is approved, we may need to fill your
19 position while you are out and so there's no
20 guarantee that a position will be available upon
21 your return," correct?

22 A Yes.

23 Q And you were advised to touch base
24 with her each month to let her know how you were
25 doing and what your anticipated return-to-work

1 Q During that conversation with
2 Mary, did you inform her of your anticipated
3 return-to-work date?

4 A There was no anticipated
5 return-to-work date. I had four rounds of chemo
6 to go through and 37 rounds of radiation. There
7 was no anticipated time.

8 Q And did you reach out to anybody
9 else at Akoustis regarding Holly Johnson's letter?

10 A I believe I sent a copy to Jen
11 Barcarse.

12 Q And what was Jen's response?

13 A She could understand why I was
14 upset.

15 Q Did you have a specific discussion
16 with Jen about the letter?

17 A Not that I recall.

18 Q Do you recall discussing the
19 letter with anyone else at Akoustis?

20 A No.

21 Q Did you reach out to Ken Boller at
22 all to discuss the letter?

23 A Not to discuss the letter, I don't
24 believe, no.

25 Q Did you reach out to Ken Boller

1 for another purpose?

2 A I believe he did call at one point
3 in time to see how I was doing, and I missed his
4 phone call so I returned the call.

5 Q Other than discussing how you were
6 doing, is there anything specific that you
7 recollect from your discussion with Ken Boller at
8 that time?

9 A Not that I recall.

10 Q Do you recall approximately when
11 this phone call took place?

12 A I do not.

13 Q At the time during your discussion
14 with Ken Boller, did you discuss whether or not
15 you had an anticipated return-to-work date?

16 A I did not.

17 Q And that's because you did not
18 have one at that time, correct?

19 A I hadn't even started chemo yet.

20 Q So you did not have an anticipated
21 return-to-work date, correct?

22 A That is correct.

23 Q Okay. At some point during this
24 leave of absence, did your health insurance
25 coverage change?

1 Q And do you recognize this
2 document?

3 A Yes.

4 Q And these are emails exchanged
5 between you and Dave Pettitt on July 3, 2019?

6 A Yes.

7 Q And is this an example of you
8 checking in with Dave to provide a status update
9 while you're out on your leave of absence?

10 A Yes.

11 Q And at this time, did you have a
12 return-to-work date?

13 A I did not.

14 Q I'm going to show you a document
15 we'll mark as Exhibit 19. It's production numbers
16 Akoustis-Kruly 638 to 639. I'll give you a minute
17 to review.

18 (Exhibit 19, Email chain between
19 Ms. Kruly and Mr. Pettitt, dated 7/20/10 and
20 7/21/19, was presented to the witness via screen
21 share.)

22 Q I don't know if it's more helpful
23 for me to scroll down to start at the original
24 email. Let me know.

25 But my question to you is: Do you

1 recognize this document?

2 A Can you scroll down, please?

3 Scroll down, please.

4 Okay.

5 Q And do you recognize this
6 document?

7 A I do.

8 Q And these are emails that you
9 exchanged with Dave Pettitt on July 20th and 21st,
10 2019?

11 A Yeah.

12 Q And is this another example of you
13 providing him with an update regarding your
14 status?

15 A Yes.

16 Q And as of the date of this email,
17 July 20, 2019, did you have an anticipated
18 return-to-work date?

19 A No, I still had two more rounds of
20 chemo to go and I hadn't started radiation yet.

21 Q I'm going to show you another
22 document we'll mark as Exhibit 20. It bears
23 production number Akoustis-Kruly 642.

24 (Exhibit 20, Email from Ms. Kruly
25 to Mr. Pettitt, dated 8/8/19, was presented to the

1 witness via screen share.)

2 Q Take a minute to review and let me
3 know if you recognize this document.

4 A Okay.

5 Q Do you recognize this document?

6 A I do.

7 Q And is this another example of an
8 update that you provided to Dave Pettitt regarding
9 your status?

10 A Yes.

11 Q And as of this date, August 8,
12 2019, did you have an anticipated return-to-work
13 date?

14 A Did not.

15 Q Okay. We'll go back to Exhibit 17
16 which we were just looking at a few moments ago
17 bearing production number 644 and you had
18 testified that you recognize this document.

19 As of the date of this email,
20 August 19, 2019, did you have an anticipated
21 return-to-work date?

22 A Did not.

23 Q Did your doctor give you any
24 indication as to an estimate of when you may be
25 available or able to return to work?

1 A They did not.

2 Q I'm going to show you another
3 document that we'll mark as Exhibit 22. I'm
4 sorry. 21, we're up to. This is a document
5 bearing production number Akoustis-Kruly 486.

6 (Exhibit 21, Email from Ms. Kruly
7 to Ms. Shealy, dated 8/19/19, was presented to the
8 witness via screen share.)

9 Q Do you recognize this document?

10 A Yes.

11 Q And what is this document?

12 A There was an issue with my blood
13 work. They had to delay the fourth round of chemo
14 and they also had to hold off on radiation due to
15 the blood work being not where it was supposed to
16 be.

17 Q And you summarized that in an
18 email to Lora Shealy on August 19, 2019?

19 A I did.

20 Q And why did you send this email to
21 Lora Shealy on August 19, 2019?

22 A I was just doing my due diligence
23 to keep people advised of what was going on. I
24 made it a point to keep everyone in the loop.

25 Q And Lora Shealy is within HR,

1 correct?

2 A That is correct.

3 Q Did you have any further
4 discussion with Lora Shealy after you sent this
5 email?

6 A I believe she asked me when I
7 thought I could come back to work, and I told her
8 I had no idea because I didn't at that point in
9 time and neither did my doctors.

10 Q And was that a conversation you
11 had via email?

12 A It was.

13 Q Do you recall speaking with her on
14 the phone at all?

15 A Not at that point in time, no.

16 Q Do you recall telling Lora Shealy
17 in response to your question as to when you may be
18 able to return to work that you, quote, wouldn't
19 even dare to guess?

20 A That is due to the delay in the
21 fourth chemo round and the delay in the radiation.
22 It was not -- it was not anything other than that.

23 Q But you did say to her that you
24 wouldn't even dare to guess when you may be able
25 to return to work?

1 A I wouldn't, because even my
2 doctors couldn't do that.

3 Q My question's a little different.
4 Did you say that to Lora Shealy,
5 is my question. Did you say to her that you
6 wouldn't even dare to guess?

7 A I believe those were the words
8 that were used in the email, yes.

9 Q Okay. Did there ever come a point
10 in time when you did actually have an anticipated
11 return-to-work date?

12 A Yes, December 1st of 2019.

13 Q And when did you learn that you'd
14 be able to return to work as of December 1, 2019?

15 A It was a couple of months after my
16 treatments were finished.

17 Q Do you recall approximately when
18 that was?

19 A I do not.

20 Q When did your treatments finish?

21 A The end of September of 2019.

22 Q And what treating professional in
23 particular informed you that you'd be able to
24 return to work on December 1, 2019?

25 A Dr. Brassachio, who was the

1 radiology oncologist, and Dr. Dirk Bernold, who
2 was the oncologist.

3 Q And did there come a time when you
4 informed Akoustis of this December 1st
5 return-to-work date?

6 A Yes, I sent the doctor's notes
7 right to Lora Shealy.

8 Q I'm going to mark another exhibit
9 as 22, bearing production numbers Akoustis-Kruly
10 497 to 499.

11 (Exhibit 22, Email to Ms. Shealy,
12 dated 9/13/19, with attachments, was presented to
13 the witness via screen share.)

14 Q Ms. Kruly, do you recognize this
15 document? And I'll scroll down to the
16 attachments.

17 A Yes.

18 Q And what is this document?

19 A The two letters that I spoke of
20 from both of my physicians releasing me back to
21 work as of December 1, 2019.

22 Q Okay. And you shared these with
23 Lora Shealy on September 13, 2019?

24 A Yes, I did.

25 Q And the first letter,

1 Akoustis-Kruly 498, from Dr. Brassachio, if I'm
2 saying that correctly, is a September 5, 2019
3 letter?

4 A Uh-huh. Yes.

5 Q And it provides a return-to-work
6 date of December 1, 2019?

7 A Yes.

8 Q Did you discuss with Dr.
9 Brassachio whether or not you had any restrictions
10 on your ability to return to work?

11 A That was discussed, actually, with
12 Dr. Bernold's nurse practitioner.

13 Q And is Dr. Bernold's nurse
14 practitioner Susan Zumbo?

15 A Yes, it is.

16 Q Okay. And on Akoustis-Kruly 499
17 is a September 10, 2019 letter signed by Susan
18 Zumbo, nurse practitioner?

19 A Yes.

20 Q And this provides a return-to-work
21 date of December 1, 2019?

22 A Yes.

23 Q And you stated that you had
24 discussed with Ms. Zumbo whether you required any
25 restrictions with regard to your return to work?

1 A Yes. There was also a letter from
2 her regarding that issue, also.

3 Q Do you have a copy of that letter?

4 A I do, but not in front of me.

5 MS. WIESELTHIER: I'm not certain
6 that that letter has been produced in discovery.
7 I'm just going to put a notation on the record
8 that it wasn't produced previously. And if it
9 was, if counsel can assist me in locating that
10 document.

11 Q So the letter from Ms. Zumbo with
12 restrictions, do you recall what the restrictions
13 were?

14 A A 30- to 32-hour workweek. Other
15 than that, I don't recall what else she had in
16 there, but I know the time frame was specific.

17 Q And did you provide the
18 information regarding potential restrictions to
19 Lora Shealy at the time you provided the
20 return-to-work date?

21 A Yes, I did. I don't know if it
22 was that same day or not, but it was certainly
23 forwarded on to her.

24 Q So this email you sent to Lora
25 Shealy was the first time that you had advised

1 Akoustis of a return-to-work date, correct?

2 A Yes.

3 Q And what was Lora Shealy's
4 response when you sent her that letter?

5 A Received. Thank you.

6 Q Did you have any further
7 discussions with Lora Shealy regarding your return
8 to work?

9 A Not at that point in time, no.

10 Q Okay. At what point in time did
11 you have a discussion with Lora Shealy about your
12 return to work?

13 A Actually, I requested a phone
14 conversation with her towards the end of November
15 of 2019.

16 Q Between your email in September
17 and the request for a phone call the end of
18 November 2019, did you have any communications
19 with Lora Shealy regarding your return to work?

20 A Not that I recall.

21 Q Did you advise anybody else other
22 than Lora Shealy of your anticipated
23 return-to-work date of December 1st?

24 A Not that I recall.

25 Q Why did you request a phone call

1 with Lora Shealy towards the end of November 2019?

2 A I don't remember the specifics of
3 that. I just wanted to speak with her to let her
4 know I was ready to come back.

5 Q And did you end up speaking with
6 her?

7 A I did.

8 Q And do you recall when?

9 A I don't remember the first phone
10 call, but I know there was a second one on
11 November 21st.

12 Q The first phone call in November
13 that predated the November 21st phone call, who
14 were the participants in the phone call?

15 A It was myself and Lora.

16 Q What was discussed on that phone
17 call?

18 A I don't recall the conversation.

19 Q Was it at that time that you
20 informed Ms. Shealy about your restriction of
21 working only 30 to 32 hours per week?

22 A I had sent that to her prior.

23 Q Did you discuss the restriction at
24 all with her during that phone call?

25 A I don't recall if I did or not.

1 Q The job you had been performing
2 for Akoustis as an accounts payable specialist,
3 that was a full-time, 40-hour week position,
4 correct?

5 A Correct.

6 Q Did you ever work overtime in that
7 role?

8 A When it was allowed. But it
9 wasn't allowed very often.

10 Q And the job duties and
11 responsibilities of an accounts payable
12 specialist, you needed 40 hours a week to get
13 those job duties done, correct?

14 A I don't know that specifically.

15 Q Well, it wasn't a part-time role?
16 It was something that needed a full-time person,
17 correct?

18 A Correct.

19 Q And you don't recall anything else
20 from your phone call with Lora -- that first phone
21 call in November with Lora Shealy?

22 A I don't.

23 Q And you said there was a second
24 phone call that occurred on November 21st?

25 A Yes.

1 Q And who participated in the
2 November 21st phone call?

3 A Myself and Lora Shealy.

4 Q And what do you recall of that
5 discussion on November 21st with Lora Shealy?

6 A Pretty much the thing that sticks
7 in my mind is that she told me that there was no
8 position for me to come back to.

9 Q Do you recall anything else that
10 was said during that call?

11 A Not specifically, no.

12 Q Did she explain why there was no
13 position for you to go back to?

14 A She attempted to.

15 Q Do you recall what she said?

16 A I do not, but it wasn't very
17 clear.

18 Q And why wasn't it clear?

19 A It just didn't seem like she had a
20 lot of information to divulge at that time.

21 THE WITNESS: Would it be possible
22 sometime soon if we can break for lunch?

23 MS. WIESELTHIER: I was just going
24 to say, I have a couple more questions on this
25 topic and then perhaps we can take a lunch break.

1 Q If it was offered to you, would
2 you have relocated to North Carolina to continue
3 in that accounts payable specialist role?

4 A Probably not, due to the fact that
5 my doctors are all up here, which I'm still having
6 to, you know, see them periodically.

7 Q The First Amended Complaint
8 alleges a claim of disability discrimination under
9 the Americans with Disabilities Act and the New
10 York City Human Rights Law, correct?

11 A Yes.

12 Q In what way do you believe that
13 Akoustis discriminated against you on the basis of
14 your disability?

15 A Well, it's my understanding of
16 that law that there should be accommodations made
17 to someone with a disability when they're ready to
18 return to their job. And those accommodations
19 were not provided.

20 Q Well, you were provided with an
21 unpaid leave of absence from June 3, 2019 through
22 November 21, 2019, correct?

23 A Yes.

24 Q All right. Did you make any other
25 requests for an accommodation during that time?

1 provide -- directly speak with anyone at Akoustis
2 regarding that request?

3 A No, no indication that that was
4 needed.

5 Q I just want to make sure I
6 understand your testimony.

7 It's your testimony that in
8 addition -- that separate from the leave of
9 absence that you were provided as an
10 accommodation, you also required an accommodation
11 for a reduced work schedule of 30 to 32 hours a
12 week, correct?

13 A On behalf of my physicians who I
14 was under the care of.

15 Q Right. But you as an employee
16 wanted -- I understand that the limit on the
17 number of hours you could work was imposed by your
18 doctor, but my question was a little bit
19 different. I just want to clarify or make sure I
20 understand your testimony about this reduced work
21 schedule.

22 So you had requested a leave of
23 absence from the company from June 3rd which ran
24 from June 3rd through November 21, 2019, correct?

25 A It actually ran to December 1st.

1 Q Sorry. So it ran through December
2 1st.

3 And that was a request for an
4 accommodation of a leave of absence that you had
5 made, correct?

6 A Yes.

7 Q And the company provided you that
8 accommodation, right?

9 A Yes.

10 Q Did you make a separate request
11 for an accommodation of a reduced work schedule
12 for 30 to 32 hours per week to anyone at Akoustis?

13 A I did not.

14 Q Okay. Additionally, the First
15 Amended Complaint alleges that the company failed
16 to accommodate you, in violation of the Americans
17 with Disabilities Act and New York State Human
18 Rights Law. Other than what you just testified
19 to, is there any other information that forms the
20 basis of your belief that the company failed to
21 accommodate you?

22 A Going back to your previous
23 question, I don't really believe that I had the
24 opportunity or the chance to request a reduced
25 work schedule due to the fact that I was told on

1 up to me as to how I was feeling and what my
2 fatigue level was. That said that they would
3 leave it to up to me at that point in time.

4 Q You're saying there was a point in
5 time you wanted them to lift the restriction?

6 A They told me that to basically
7 play it by ear. If my fatigue level had leveled
8 off and everything was getting back to somewhat
9 normal, then to feel free to do what I felt that I
10 needed to do if that meant working more than 32
11 hours a week.

12 Q Okay. Sitting here today, do you
13 think you are capable of working a 40-hour
14 workweek?

15 A I'm not really sure how to answer
16 that because I haven't done it in a while. It
17 probably would take a little bit to get back up to
18 speed, to be honest.

19 Q Okay. The COBRA payments that are
20 listed here, this is related to the COBRA benefits
21 that you received following your separation of
22 employment with Akoustis?

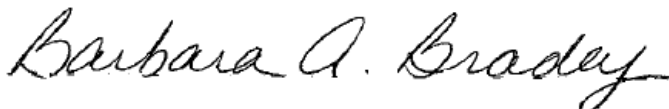
23 A That's the COBRA payments that I
24 paid out-of-pocket to continue my insurance
25 coverage while I was going through treatment.

1 CERTIFICATE
2

3 I, BARBARA A. BRADEY, a Notary Public
4 and Certified Court Reporter of the State of New
5 Jersey, License No. 30XI00202900, do hereby
6 certify that prior to the commencement of the
7 examination, the Witness, MARLENE A. KRULY, was
8 duly sworn by me to testify the truth, the whole
9 truth and nothing but the truth.

10 I DO FURTHER CERTIFY that the foregoing
11 is a true and accurate transcript of the testimony
12 as taken stenographically by and before me at the
13 time, place and on the date hereinbefore set
14 forth.

15 I DO FURTHER CERTIFY that I am neither
16 a relative nor employee nor attorney nor counsel
17 of any of the parties to this action, and that I
18 am neither a relative nor employee of such
19 attorney or counsel, and that I am not financially
20 interested in the action.
21
22

23 

24 Notary Public of the State of New Jersey

My Commission expires June 30, 2022

25 Dated: February 25, 2022

EXHIBIT 6

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 -----
4 **MARLENE A. KRULY,**

5 Plaintiff,

6 -vs-

Index No. 21-CV-6181G

7 **AKOUSTIS TECHNOLOGIES, INC., ,**

8 Defendant.
9 -----

10
11 **EXAMINATION BEFORE TRIAL OF KENNETH BOLLER**

12 **APPEARING REMOTELY FROM**

13 **CHARLOTTE, NORTH CAROLINA**

14
15
16 July 1, 2022

17 At 9:30 a.m.

18 Pursuant to notice
19

20 REPORTED BY:

21 Brooklyn Morton, Notary Public

22 APPEARING REMOTELY FROM ERIE COUNTY, NEW YORK
23

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KENNETH BOLLER 07/01/2022

1 A. So accounts payable was then done in New York
2 and checks were cut here in North Carolina.

3 Q. And to be clear, when you talk about the two
4 different systems, QuickBooks and Sage, that
5 wasn't just for accounts payable. That was
6 for all accounting, correct?

7 A. Yes.

8 Q. Okay. So when accounts payable was combined
9 to be done in New York, there was nobody doing
10 accounts payable in North Carolina?

11 A. Correct.

12 Q. What happened to the person who was doing
13 accounts payable in North Carolina when the
14 function was moved to New York?

15 A. That person was an accounting
16 supervisor/manager type of role. So they had
17 other accounting work, not clerical work.

18 Q. What's the name of that person?

19 A. It's Thomas Sloan.

20 Q. When the function was combined in New York,
21 who was doing the work in New York?

22 A. Marlene.

23 Q. When you got there, who was doing the work in

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1 combination of the systems, QuickBooks and
2 Sage, to have that function performed in New
3 York. When did that happen?

4 A. June 2018.

5 Q. And you said the transition back to North
6 Carolina happened in August, September of
7 2019?

8 A. Correct.

9 Q. Okay. When did the discussion begin about
10 transitioning the accounts payable function
11 from New York to North Carolina?

12 A. I am not certain of the exact date, but spring
13 of 2019.

14 Q. How did that discussion begin?

15 A. Well, we were in the process of putting a lot
16 of different controls in place because my role
17 initially was to bring structure to the
18 company, a number of different initiatives and
19 policies and procedures, the chief one being
20 getting on one system. I made a number of
21 improvements over that next six to
22 nine months. In my experience, the accounts
23 payable role has always been sort of a shared

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—KENNETH BOLLER 07/01/2022—

1 services role around the corporate area.

2 Q. I am sorry. What did you say before

3 corporate?

4 A. A shared services type of role.

5 Q. What do you mean by that?

6 A. It's where a service is performed that

7 benefits the full entire company, but out of

8 one central location either in its own shared

9 services operation department within --

10 typically within corporate headquarters.

11 Q. So after June of '18 who do you recall being

12 the first person to begin a conversation about

13 potentially moving the function to North

14 Carolina?

15 A. Myself.

16 Q. Okay. And who was the first person you recall

17 talking to about that subject?

18 A. Dave Pettitt.

19 Q. Okay. Was anybody else involved in that

20 initial conversation?

21 A. He then, I believe, had a conversation with

22 Mary Winters.

23 Q. Okay. Well, let's stick first with the

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—KENNETH BOLLER 07/01/2022—

1 conversation you had with Dave. What do you
2 recall about that conversation?

3 A. That I would like to move the position to
4 North Carolina for him to solicit -- get his
5 input and also, solicit Mary's input as VP of
6 the New York location.

7 Q. And was that conversation in person or by
8 phone?

9 A. Initially by phone and then by email.

10 Q. Okay. What else do you recall about the
11 initial telephone conversation?

12 A. Nothing.

13 Q. How long did the conversation last?

14 A. I don't know.

15 Q. I am sorry. I am not hearing you, sir.

16 A. I don't know. I don't remember.

17 Q. What was Dave's reaction to the suggestion of
18 moving the function to North Carolina?

19 A. Initially we were trying to weigh the pros and
20 cons and he was trying to layout some of the
21 pros and cons of the position being in one
22 location versus the other. There was also
23 input from Mary on morale type of suggestions

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1 A. I seem to recall agreeing in general and I
2 think his consensus was more along the line of
3 it would work in either location.

4 Q. And you agreed with that assessment?

5 A. Yes. Functionally it would work.

6 Q. What was the reason why you were suggesting to
7 Dave to move the position to North Carolina?

8 A. So some of the reasons were to allow Dave to
9 perform his role as plant controller, try to
10 get him away from the accounts payable part of
11 his job moving it to Andrew who was a manager
12 down here. Part of it was that was the model
13 that I am used to. As I mentioned earlier,
14 that role is more of a corporate function or
15 shared services function. We were also
16 cutting checks out of North Carolina, another
17 part of his role outside of the function, I
18 guess.

19 Q. Any other reasons?

20 A. It just allows us to have more control of the
21 process and especially at that time, we were
22 struggling to bring control a lot of different
23 processes and procedures throughout the

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1 company.

2 Q. At any point in time since the function moved
3 to North Carolina, has Dave Pettitt overseen
4 accounts payable?

5 A. Yes.

6 Q. When was it that Dave oversaw accounts payable
7 after the move to North Carolina?

8 A. So Andrew managed accounts payable after that
9 August, September 2019 timeframe and I don't
10 recall the exact time when Andrew left the
11 company. He was no longer part of the company
12 I want to say summer, spring of 2020. I would
13 have to check my records on that and when
14 Andrew left, Dave unfortunately had assumed
15 the role again.

16 Q. So since the spring, summer of 2020 Dave has
17 been supervising accounts payable?

18 A. Yes.

19 Q. Was Tom Sloan still with the company in the
20 spring or summer of 2020?

21 A. No.

22 Q. When did he leave?

23 A. Spring, summer of 2018.

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1 A. When I first joined, I don't recall at this
2 time.

3 Q. Currently, is it more New York or more North
4 Carolina?

5 A. I don't know.

6 Q. Any other reasons that you can recall?

7 A. Not that I recall at this moment.

8 Q. In the spring of 2019 when you first had the
9 conversation with Dave, what role, if any, did
10 Marlene's job performance have on the
11 discussion of moving the job to North
12 Carolina?

13 A. I don't recall much discussion on that.

14 Q. You mentioned that Mary was concerned about
15 morale because Marlene was in and out because
16 of her illness. Do you recall what Marlene's
17 status was at the time of this conversation
18 with Dave and when Mary provided her input?

19 A. I don't know if I knew what that was at that
20 time.

21 Q. When did you first learn that Marlene had some
22 kind of health issue?

23 A. Not certain. Timeframe, summer of 2019,

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—KENNETH BOLLER 07/01/2022—

1 spring, summer.

2 Q. Who was it that told you that information?

3 A. I don't remember.

4 Q. What was your understanding as to what the
5 health issue was when it first came to your
6 attention?

7 A. That it was some form of cancer, is what I
8 recollect.

9 Q. Did there come a point in time when Ms. Kruly
10 was out of work for an extended period of time
11 because of her cancer?

12 A. I know there was a substantial amount of days
13 off for sickness and at some point in time a
14 leave of absence.

15 Q. So my question is, the conversation that you
16 first had with Dave and then when Mary
17 provided her input, was it your understanding
18 that at that point in time Marlene was already
19 on her leave of absence or was it before that?

20 A. It was before that.

21 Q. When Marlene went on her leave of absence,
22 what part along the timeline were you in terms
23 of the decision to move the position to North

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1 Carolina?

2 A. Can you say that again?

3 Q. Sure. At the point in time when Marlene went
4 on her leave of absence, at what point were
5 you along the timeline of moving the position
6 to North Carolina?

7 A. So that was after my initial discussions with
8 Dave, but no decision had been made as of yet.
9 So no decision was made to move or to not
10 move.

11 Q. Okay. So I asked you in terms of the list of
12 reasons for the move about Marlene's job
13 performance and you said that there wasn't
14 discussion about that. What discussion, if
15 any, was there about the fact that Marlene was
16 on a leave of absence in connection to moving
17 the job to North Carolina?

18 A. I recall just making sure that we reached out
19 to the relevant HR experts, legal counsel on
20 what is proper, what's allowed or not allowed
21 making sure that we were covered.

22 Q. Who were the HR experts that you reached out
23 to?

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1 to North Carolina?

2 A. I don't recall any specifics again, but yes.

3 Q. And other than the fact that you had a
4 conversation, is there anything in general
5 about the conversation without specifics that
6 you do recall?

7 A. Just in general that we could move the
8 position.

9 Q. Now, at the time that Marlene went out on her
10 leave of absence, your testimony is the
11 decision had not yet been made about the move.
12 Was there discussion with Dave about how to
13 accomplish the accounts payable function while
14 Marlene was on leave of absence in the short
15 term?

16 A. I don't recall specifics, but yes.

17 Q. Well, the day Marlene went on her leave of
18 absence, who was doing accounts payable when
19 she was gone?

20 A. Dave. Dave had assumed the function any time
21 Marlene was out throughout her tenure with
22 Akoustis and then after her leave.

23 Q. So there was a period of time from when

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1 Marlene went out until Kristin was hired,
2 correct?

3 A. Yes.

4 Q. Okay. So when Marlene first went out or at
5 some point thereafter did Dave say to you, you
6 know, I really can't do the accounts payable
7 myself in addition to all my jobs, I need help
8 in words or substance?

9 A. In substance, yes.

10 Q. And what was the conversation about how to
11 provide him that help?

12 A. That we would seek assistance first in the
13 form of a temporary role so that he could
14 perform what he is really meant to do, his
15 day-to-day work as controller.

16 Q. Was there any discussion about hiring a temp
17 for Dave in New York?

18 A. I don't recall.

19 Q. Okay. Was there any discussion about
20 accelerating the timeline about making a
21 decision concerning moving the job to North
22 Carolina?

23 A. I don't recall.

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1 you are used to, the checks being in North
2 Carolina, the opportunity for more control if
3 the function was performed in North Carolina,
4 none of those reasons would be inconsistent
5 with Marlene continuing to perform the
6 function if she was in North Carolina,
7 correct?

8 A. Correct.

9 Q. But, you don't recall any conversation about
10 the possibility of having her do so?

11 A. No specific conversation I recall.

12 Q. Even any general conversations?

13 A. No.

14 Q. So the decision to move the position to North
15 Carolina had not yet been made at the point in
16 time when Marlene went out on a leave of
17 absence. Was the decision to move the
18 position to North Carolina made before Kristin
19 was hired as a temp?

20 A. Yes.

21 Q. So why wasn't Kristin just hired as a regular
22 employee then?

23 A. I don't recall.

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1 Q. Do you recall any discussion about whether she
2 was going to be hired as a temp versus an
3 employee?

4 A. Not that I recall.

5 Q. Who was it who actually made the decision to
6 move the position to North Carolina?

7 A. Ultimately it would have been me to sign off
8 on it.

9 Q. Did anybody else have any yes or no decision
10 power other than you?

11 A. There would have been input from Dave and from
12 Andrew.

13 Q. And other than their input, anybody else that
14 would have input?

15 A. Input from HR and Mark Burgess, counsel.

16 Q. And once you got all of that input, it was
17 your decision to make?

18 A. Yes.

19 Q. And so let's go through those. Did Dave
20 express a yes or no concerning the move to
21 North Carolina?

22 A. I don't recall specifically.

23 Q. I know you testified earlier that Dave said

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1 Q. Okay. So once the decision was made to move
2 the position to North Carolina, why wasn't
3 Ms. Kruly separated from employment at that
4 point in time?

5 A. I believe she was on a leave of absence at
6 that time.

7 Q. Okay. Why would the company have continued to
8 solicit from Ms. Kruly whether and when she
9 would be returning -- approved to return to
10 work?

11 A. I don't know all the rules and regulations and
12 requirements for something like that. I don't
13 know.

14 Q. Once Kristin was hired, there was no accounts
15 payable position for Ms. Kruly to return to in
16 New York, correct?

17 A. Yes.

18 Q. Okay. At that point in time once Kristin was
19 hired, were you aware of any other positions
20 in New York that Ms. Kruly could have filled
21 if she was cleared to return to work?

22 A. I don't know what positions were open around
23 that time period.

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1 payable position?

2 A. Yeah. It would depend on the workload and
3 what it was then and what it is, what it
4 migrated to, but the workload would -- I would
5 say yes. We don't have a history of many of
6 that, but it is something we could look into.

7 Q. Okay. In 2019 based on the workload as you
8 understood it from Marlene and/or from Dave
9 Pettitt, is that something that you thought an
10 employee working 30 to 32 hours could get
11 enough of that job done to be worth
12 accommodating that restriction?

13 A. I don't know what the workload was in 2019.

14 Q. I think you testified earlier about the
15 workload when Dave said that he needed help
16 when Marlene went out.

17 Did you have an understanding from Dave
18 at that point in time that the position needed
19 40 hours or more to get the work done?

20 A. I don't know the level of hours needed for
21 that role at that time.

22 Q. Okay. A medical restriction that an employee
23 be able to work from home, is that something

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1 printer/scanner at home?

2 A. Yes.

3 Q. I am sorry?

4 A. Yes.

5 Q. Okay.

6 A. I don't know about security at that time and
7 what was, you know, available only at the
8 office or at home, but we could have given her
9 a printer and a scanner.

10 Q. What printing did Mary have to do -- Marlene
11 have to do in connection with the accounts
12 payable function?

13 A. I don't know all the details, but printing
14 invoices, getting signatures and approvals and
15 getting proper support, putting together
16 three-way and it be properly approved. So
17 just compiling like a package.

18 Q. The approvals, those could be provided
19 electronically via email from the relevant
20 person authorizing the expenditure?

21 A. They can, yes. At the time, that was not our
22 general process.

23 Q. So at that point in time Marlene was doing the

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1 STATE OF NEW YORK)

2) ss.

3 COUNTY OF ERIE)

4
5 I, Brooklyn Morton, Notary Public, in and for
6 the County of Erie, State of New York, do
7 hereby certify:

8 That the witness whose testimony appears
9 hereinbefore was, before the commencement of
10 their testimony, duly sworn to testify the
11 truth, the whole truth and nothing but the
12 truth; that said testimony was taken pursuant
13 to notice at the time and place as herein set
14 forth; that said testimony was taken down by me
15 and thereafter transcribed into typewriting,
16 and I hereby certify the foregoing testimony is
17 a full, true and correct transcription of my
18 shorthand notes so taken.

19 I further certify that I am neither counsel
20 for nor related to any party to said action,
21 nor in anyway interested in the outcome
22 thereof.

23 IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed my seal on this
19th day of July, 2022.

20 *Brooklyn Morton*

21 -----
22 Brooklyn Morton
23

DEPAOLO CROSBY REPORTING SERVICES, INC.

135 Delaware Avenue, Suite 301, Buffalo, New York 14202
716-853-5544

EXHIBIT 7

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 -----
4 **MARLENE A. KRULY,**

5 Plaintiff,

6 -vs-

Index No. 21-CV-6181G

7 **AKOUSTIS TECHNOLOGIES, INC.,**

8 Defendant.
9 -----

10 **EXAMINATION BEFORE TRIAL OF DAVID PETTITT**

11 **APPEARING REMOTELY FROM**

12 **CANANDAIGUA, NEW YORK**

13
14
15 June 24, 2022

16 9:32 a.m. - 1:00 p.m.

17 pursuant to notice

18
19
20 REPORTED BY:

21 Carrie A. Fisher, Notary Public

22 APPEARING REMOTELY FROM ERIE COUNTY, NEW YORK

23
DEPAOLO CROSBY REPORTING SERVICES, INC.

135 Delaware Avenue, Suite 301, Buffalo, New York 14202
716-853-5544

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 little bit. If you don't hear or understand a
2 question that I ask, just say so. I will
3 repeat the question or rephrase the question
4 as is necessary. If you don't raise a concern
5 about a question, we're going to assume that
6 you understood it; is that fair?

7 A. That's fair.

8 Q. Okay. If at any point in the time this
9 morning you need to take a break, just say so
10 and we'll take a break. I would just ask that
11 if there is a question pending that you answer
12 the question first and then we'll take a
13 break, okay?

14 A. Yes.

15 Q. Okay. When did you join Akoustis?

16 A. I joined Akoustis November 2017.

17 Q. And when you joined, what was your position?

18 A. Plant financial controller.

19 Q. And what is your current title?

20 A. Plant financial controller.

21 Q. Okay. If you could, take me through your post
22 secondary employment up through Akoustis.

23 A. So I have a bachelor's degree in math and a

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 accounts payable from New York to North
2 Carolina take, over what period of time?

3 A. I only put the -- I was asked for input as to
4 does it matter having it North Carolina versus
5 New York, and I replied to that. How long it
6 took after that you would have to -- I was not
7 part of the discussion of whether or not to
8 move it to North Carolina. I was just part of
9 the input to say here is the pluses and
10 minuses of moving it or keeping it in the same
11 location.

12 Q. Who did you give that input to?

13 A. I would have given it to Ken Boller. If they
14 copied in HR, I don't recall but the email
15 correspondence would give you that answer.

16 Q. After you gave the input and then you were not
17 part of the discussion, who was it who got
18 back to you and told you what the decision
19 was?

20 A. Ken Boller.

21 Q. And do you recall how long it was from the
22 time you gave your input to Ken to when Ken
23 got back to you and told you what the decision

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 was?

2 A. I don't recall the exact day that -- or
3 timeframe that Ken let me know that that was
4 the decision.

5 Q. Okay. And then after Ken told you what the
6 decision was, how long did it take to
7 implement that change?

8 A. I don't know how long it took them to locate
9 the temporary employee in North Carolina, so I
10 can't really answer that question.

11 Q. Okay. So just again to try to get the
12 sequence of events, the decision was made to
13 move the position to North Carolina and at
14 that point in time the temp was hired; is that
15 correct?

16 A. That would make sense. Otherwise, you
17 wouldn't hire somebody in North Carolina if
18 you weren't planning on moving it.

19 Q. Well, I guess when the temp was hired
20 initially, was the plan that the temp was
21 hired to fill in for Marlene or was the plan
22 that the temp was hired for the new position
23 in North Carolina?

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 A. You'd have to talk with Ken and HR. I was not
2 part of that discussion.

3 Q. Did you talk to Ken or HR about getting a temp
4 when Marlene went out?

5 A. I had a discussion that said I need some help,
6 yes. That part was discussed.

7 Q. When Marlene went out, who did the accounts
8 payable function initially?

9 A. Myself.

10 Q. How long were you doing it before they got the
11 temp?

12 A. You'd have to go back to the timeframe of
13 Marlene's absences and look at the date of
14 when the temp was hired and that change would
15 be what I did, so I would defer to that
16 timing.

17 Q. Is it your recollection that that was a period
18 of weeks or a period of months?

19 A. I would say -- so it gets a little bit cloudy
20 because prior to Marlene officially going out
21 she -- she had attendance issues prior to that
22 which I also had to cover, so I don't know the
23 exact timeframe that way but...

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 discussion with greater granularity as to why
2 the attendance rate was what it was.

3 Q. Sitting here today, do you have a recollection
4 of talking anything more specific about
5 attendance?

6 A. Outside of that the attendance was low, I
7 don't recall having discussions about --
8 specifically about medical if that's what
9 you're asking.

10 Q. Right, okay. Now there is a reference here to
11 a meeting with -- on May 13th with you and Ken
12 regarding Marlene and perhaps Holly if she was
13 the author. Do you recall having the meeting
14 at least with Ken on May 13th regarding
15 Marlene?

16 A. I don't specifically recall that meeting, but
17 I meet with Ken frequently.

18 Q. Well, there is a reference here to "Ken would
19 like to move AP back to corporate." Do you
20 see that reference there on the May 13th?

21 A. Yep.

22 Q. Do you recall Ken telling that to you?

23 A. I recall the discussion in the email I sent in

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 regards to having the position in North
2 Carolina versus New York. That's probably
3 within that timeframe, but I don't know the --
4 I don't recall the specific dates. You'd have
5 to go back to kind of that correspondence.

6 Q. As of May 13th, did you have an opinion one
7 way or the other -- and, again, just reminding
8 you of the timeline, it wasn't until June 11th
9 that Marlene put in that email indicating that
10 she was going to be out for a block of months.
11 As of May 13th, did you have an opinion as to
12 whether or not the AP function should be in
13 New York or North Carolina?

14 A. So there is an email from me to Ken. Do you
15 have that exhibit regarding the move
16 potentially to North Carolina versus New York?

17 Q. Yeah, yeah, I have that. I'm not done with
18 this document but that's fine. Let's move to
19 that one. We will mark as Exhibit 47 what was
20 produced as Akoustis-Kruly 379.

21 Okay. Is this the email you were just
22 talking about?

23 A. Yeah, that looks like it. This was on the

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

1 New York." Now a few moments ago it sounded
2 like you were saying that was really more Mary
3 and that you didn't share that sentiment, so
4 why did you write in that email that you both
5 feel that way about the move?

6 MS. WIESELTHIER: Objection to form.
7 You can answer the question.

8 A. I think my feeling was more I can understand
9 Mary's view and so I would agree that given --
10 given that the recent medical situation, which
11 wasn't just known by me or just by me and Mary
12 but it was a known by many people within the
13 company, within New York, that I can certainly
14 see that the optics would potentially generate
15 negative morale in New York.

16 Q. Now, you say -- sorry, you say in the email
17 that there was some discussion about the
18 ability to work remotely and that it was not
19 something that at least as of May of 2019 you
20 didn't think was conducive to working remotely
21 given the amount of printing, scanning, and
22 direct contact needed. Would you say today
23 that you've learned that in fact that job

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 could be done remotely?

2 A. Given the enhancements and implementations and
3 discussions with vendors such that we've now
4 gotten a lot higher percentage of invoicing
5 electronically and we have some through
6 continuous improvement measures and have
7 better scanning and ability to save things on
8 SharePoint, the role of accounts payable could
9 be done potentially remotely with periodic
10 office visits to pick up invoicing that took
11 place. We found that through the pandemic
12 where the -- I would come in just weekly to
13 grab and the accounts payable person in North
14 Carolina would come in weekly to obtain hard
15 copy invoices to handle and everything else
16 was done from home during the pandemic.

17 Q. So you already had in place before the
18 pandemic as it related to the periodic plant
19 shutdowns the ability to work remotely,
20 correct?

21 A. We had the ability to work remotely on our PCs
22 and what not, yes, but the percentage of
23 invoices coming in through manual mail was

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 much higher. And so even during shutdown, the
2 shutdown period is only maybe four days so,
3 you know, you come back four days later and
4 you could get back to work. In terms of
5 getting those caught up, those invoices,
6 though a shutdown is not -- the pandemic was
7 obviously a much different situation because
8 it was longer term.

9 Q. You could log in remotely to the network from
10 home, correct?

11 A. You could, yes.

12 Q. So if you had a laptop and an internet
13 connection, you could do the same computer
14 work remotely that you could do from the
15 office?

16 A. Computer work, yes.

17 Q. And if you had a printer/scanner at home, you
18 could do the printing and scanning, correct?

19 A. Provided you have all the invoices. You have
20 to -- so at the time when Marlene was here,
21 the percentage of invoices that came via hard
22 copy was much higher. Today, after that
23 pandemic, you know, not just us but many

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 companies that were doing mail invoices are
2 now doing -- have migrated to electronic. I
3 guess if there is any good thing from the
4 pandemic, that's probably one thing that has
5 helped.

6 Q. Now if you look at the sentence before that
7 where it says Mary was talking about wanting
8 to try to work with employees faced with
9 hurdles to deal with and you responded that
10 you shared the sentiment but that you
11 explained that the job couldn't be done
12 remotely or you didn't think it could be done
13 remotely as well at that point in time. Is it
14 fair to say that Mary was saying or advocating
15 for Marlene to be able to do the job remotely?

16 A. I would not say she was advocating. I think
17 she was just raising the question.

18 Q. And you were answering the question by saying
19 you didn't think it would work?

20 A. That's correct.

21 Q. Now earlier you had testified about kind of
22 the pluses and minuses of New York versus
23 North Carolina. Were you referring to the

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—DAVID PETTITT - BY MR. SANDERS - 06/24/22—

1 this email May 22 which we've marked as
2 Plaintiff's Exhibit 29, did you understand
3 that no final decision had been made about
4 whether or not to move the position from New
5 York to North Carolina?

6 A. I had no involvement in it so I can't say for
7 sure one way or the other, but it was -- I had
8 not been told at that point that they had
9 already made the decision to move it to North
10 Carolina.

11 Q. Well, not only had you not been told that they
12 had made a decision, you had not been told
13 whether or not a decision had been made?

14 A. That's correct.

15 Q. So as of May 22, you did not know whether the
16 position was going to be in New York or North
17 Carolina?

18 A. That's correct.

19 Q. And you did not have any knowledge of any
20 decision being made as of that point in time
21 about that question?

22 A. That's correct.

23 Q. Okay. I am going to go back to what we marked

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

1 STATE OF NEW YORK)

2 COUNTY OF ERIE)

3
4 I, Carrie A. Fisher, Notary Public, in and
5 for the County of Erie, State of New York, do
6 hereby certify:

7 That the witness whose testimony appears
8 hereinbefore was, before the commencement of
9 their testimony, duly sworn to testify the
10 truth, the whole truth and nothing but the
11 truth; that said testimony was taken remotely
12 pursuant to notice at the time and place as
13 herein set forth; that said testimony was
14 taken down by me and thereafter transcribed
15 into typewriting, and I hereby certify the
16 foregoing testimony is a full, true and
17 correct transcription of my shorthand notes so
18 taken.

19 I further certify that I am neither counsel
20 for nor related to any party to said action,
21 nor in anyway interested in the outcome
22 thereof.

23 IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed my seal this
18th day of July, 2022.

19
20 

21 Carrie A. Fisher
22 Notary Public - State of New York
23 No. 01FI6240227
Qualified in Erie County
My commission expires 5/02/23

DEPAOLO CROSBY REPORTING SERVICES, INC.

EXHIBIT 8

Extended Leave of Absence Request

Company Instructions: A company representative with the appropriate authority must submit all requested information to TriNet via the Extended Leave Request Action through the TriNet online platform. Leave requests should be submitted to TriNet as soon as requested by the employee. If advance notice is received, requests should be submitted no less than seven business days prior to the leave effective date.

Company Representative:

LEGAL NAME (as shown on employee's Social Security Card)		TRINET EMPLOYEE ID IF KNOWN	
Last <u>Johnson</u>	First <u>Holly</u>	Middle <u>H</u>	<u>00001335015</u>
COMPANY NAME <u>Akoustis Technologies</u>			

TriNet will modify the employee's status in accordance with your directions. Please note the following:

Notifications:

The employee will receive a Leave of Absence Notification letter explaining the leave conditions and rights as they pertain to the leave. Any state or federal notices of employee's rights under a state or federal leave plan will be sent to the employee's home address. Examples: Family Medical Leave Act (FMLA), Pregnancy Disability Leave (PDL), California Family Rights Act (CFRA).

Benefits:

In accordance with the TriNet Benefits Guidebook, if granted an Extended Leave of Absence which is not governed by a state or federal leave plan (such as FMLA or California PDL), the employee's benefits coverage will continue as if the employee was an active employee for 30 days. After those 30 days, coverage will continue until the end of the month in which the 30th day occurs. If the employee is eligible for and takes leave under a state or federal leave law with benefits protection, benefits will end at the end of the month following the exhaustion of the available leave. COBRA continuation will then be offered to the employee, if eligible.

Disability Claims:

Employees eligible for TriNet sponsored group short- and/or long-term disability benefits with Aetna must initiate their own claim by contacting Aetna directly. Eligible employees will be sent an Initial Notice that contains Aetna's contact information. State disability claim forms (when applicable) will be sent to the employee with their initial notification letter. These state disability claim forms must be completed and filed by the employee and sent directly to the applicable state agency.

Payroll Time Entry:

- If the employee will be using any PTO or sick or vacation time, the leave must be noted as a paid leave and the time should be reported on the Payroll Time Entry page along with the regular on-cycle payroll. If the leave is not fully paid, Leave Without Pay hours should be entered to reach the expected standard pay period hours.
- Special Payroll entries for an employee designated as on an unpaid leave should be sent to the TriNet Client Services Associate (examples: bonus, commissions, payment of accrued time, holiday pay). Time entry via the TriNet online platform will no longer be accessible for employees on unpaid leave until they return to work.

Return to Work:

Please submit a Return to Work action request via the TriNet online platform as soon as the employee returns to work. A medical release (if medical leave) should be collected from the employee upon return to work. If an employee fails to return to work or requests additional leave and/or accommodations, please contact your TriNet Human Capital Consultant for guidance.

Leave and Benefit Premium Repayment Approval

Extended Leave of Absence:

☒ Approved ☐ Denied

Benefit Premium Repayment:

☐ Approved

☒ Denied

☐ We have made alternate arrangements with the employee

☐ Not Applicable - the employee is not enrolled in group benefits

Employee is responsible to submit payments on a bi-weekly basis

Leave of Absence Condition

Please confirm:

☒ First day of leave: 6/3/19

☒ Employee's last day worked: 5/31/19

☒ First day leave is unpaid: 6/3/19

☒ Date of disability (if medical or worker's compensation): 6/3/19

Will the employee be using PTO or sick or vacation time while on LOA? (Hours will be applied at the beginning of the leave unless otherwise indicated in the notes section of the TriNet Extended Leave Request Action submission.)

☒ None

☐ Sick. Indicate how many hours will be applied _____

☐ Vacation. Indicate how many hours will be applied _____

☐ PTO. Indicate how many hours will be applied _____

☐ Other Type of Pay (other than regular, sick, PTO or vacation, such as admin pay or floating holidays) Type: _____ Hours: _____

Does this leave qualify for FMLA or other state family medical leave? (Talk with your Human Capital Consultant if you need help determining)

☐ Yes ☒ No

Please Note: The Company is responsible for timely reporting of job status and payroll changes to TriNet.

Company Representative Signature

PRINTED NAME AND TITLE <u>Holly H. Johnson Dir of HR</u>	SIGNATURE <u>Holly H. Johnson</u>	DATE <u>6/13/19</u>
---	--------------------------------------	------------------------

EXHIBIT 9

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 -----
4 **MARLENE A. KRULY,**

5 Plaintiff,

6 -vs-

Index No. 21-CV-6181G

7 **AKOUSTIS TECHNOLOGIES, INC.,**

8 Defendant.
9 -----

10 **EXAMINATION BEFORE TRIAL OF LORA SHEALY**
11 **APPEARING REMOTELY FROM**
12 **CORNELIUS, NORTH CAROLINA**

13
14
15 June 23, 2022

16 1:29 p.m. - 6:33 p.m.

17 pursuant to notice
18
19

20 REPORTED BY:

21 Carrie A. Fisher, Notary Public

22 APPEARING REMOTELY FROM ERIE COUNTY, NEW YORK
23

DEPAOLO CROSBY REPORTING SERVICES, INC.

135 Delaware Avenue, Suite 301, Buffalo, New York 14202
716-853-5544

~~LORA SHEALY - BY MR. SANDERS - 06/23/22~~

1 get paid. It's a -- you know, it's not a job
2 that you could just say we'll let it go for
3 six months because then we would probably get
4 sued because we wouldn't pay any of our bills,
5 so we had to have someone write the checks and
6 pay the bills and so we had to hire somebody
7 to do that job.

8 Q. Let's talk about that, and then we will come
9 back to this other topic. What role, if any,
10 did you play in finding somebody to do that
11 job while Marlene was out?

12 A. Well, finding somebody to do the job? Well,
13 that was my job. So if I got a job req, then
14 it was my job to go find somebody to fill the
15 job who is qualified for the job.

16 Q. Do you recall any discussion about whether
17 that -- somebody to fill the job would be in
18 New York or North Carolina?

19 A. You know, I've tried to remember some of these
20 details, but it's very vague to me other than
21 what I've written in my notes. That's really
22 the best of what I know.

23 Q. Whose decision was that in terms of whether

~~DEPAOLO CROSBY REPORTING SERVICES, INC.~~

~~LORA SHEALY - BY MR. SANDERS - 06/23/22~~

1 the job would be in New York or North
2 Carolina?

3 A. That would decision would have been made by
4 people higher up than me. That would have
5 been like the CFO because that was his
6 department.

7 Q. So that would have been Ken?

8 A. What's that?

9 Q. Would that be Ken?

10 A. Ken -- I mean, Ken was the person in charge of
11 the department and so he is the decision maker
12 for his department. And by this time we had
13 hired Holly, and she was the director of HR so
14 she would have been above me so those
15 decisions would have been made without me.

16 Q. So you weren't a part of the discussion about
17 whether it be New York or North Carolina?

18 A. I remember those discussions, I do. I don't
19 remember what was said. I just know that
20 ultimately I was not the final decision maker.
21 So like they might have asked my opinion or
22 something which I don't -- I don't remember
23 that happening, but we're very collaborative

~~DEPAOLO CROSBY REPORTING SERVICES, INC.~~

~~LORA SHEALY - BY MR. SANDERS - 06/23/22~~

1 Q. Well, because you don't necessarily know who
2 is doing it today.

3 A. No, I have no idea. I don't know anything
4 about what's going on.

5 Q. Do you know who was doing it when you left?

6 A. When I left it would have been I believe
7 Kristen, Kristen Gaines.

8 Q. And was Kristen the person who was initially
9 hired as a temp?

10 A. Yes, definitely.

11 Q. So from the time -- well, let's back up.

12 So before Marlene was doing it, who was
13 doing accounts payable?

14 A. Oh golly, man, you're talking about a long
15 time ago. You know what, here is the thing
16 about memories is that things stand out and
17 then there might be a gap, you know, so I very
18 vividly remember when we first started the
19 company within the first few years -- oh,
20 well, when we hired our first CFO she took
21 over accounts payable, Cindy. So that was in
22 North Carolina because I remember my person
23 who I shared an office with her name was

~~DEPAOLO CROSBY REPORTING SERVICES, INC.~~

—LORA SHEALY - BY MR. SANDERS - 06/23/22—

1 she was ready to come back to work and the
2 company said you don't have a job to come back
3 to? In words or substance, is that how the
4 conversation went?

5 A. I don't know if it went in that order, you
6 know.

7 Q. Okay. What's your recollection?

8 A. You know, I'm not sure. I really don't know
9 the dates and the timeline and the order but I
10 do know that we were told that we needed --
11 that it was a best practice to let her know
12 that due to FMLA and since New York had less
13 than 50 employees that there was not -- that
14 we were not required to hold the job and that
15 we needed to communicate that to her. I don't
16 know where that was in the timeline though. I
17 really don't.

18 Q. So that communication would have been made
19 during her leave of absence and before she was
20 ready to return to work?

21 A. During her -- well, I don't know if it would
22 have been during her leave or when she
23 notified us that she was like going on leave

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—LORA SHEALY - BY MR. SANDERS - 06/23/22—

1 status is. She's not keeping me in the loop.
2 I need to reach out to her." Nothing like
3 that ever happened?

4 A. Not that I ever wondered, like proactively
5 wondered. I think that Marlene had implied to
6 me and I don't know to Dave, but she had kind
7 of implied to me that she had no idea when she
8 would be returning to work so it was a
9 question. It was a question mark, like when
10 could she come back. We don't really know.

11 Q. All right. Let's mark as Exhibit 34 the pages
12 Bates numbered 487 and 488. See that there?

13 A. Yep.

14 Q. The email is at the top of the page, but the
15 date of it is August 19 of 2019 from Marlene
16 to you.

17 A. Yep, uh-huh.

18 Q. Do you recall getting this email?

19 A. I don't. I mean, I remember because you just
20 showed it to me. Yeah, I mean, I definitely
21 remember she was -- because your heart hurts
22 for somebody when they're going through this.

23 Q. Do you recall that at one point in time that

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

—LORA SHEALY - BY MR. SANDERS - 06/23/22—

1 going to be on there. I don't remember. I
2 just know that it was more of an HR call
3 rather than being the VP of the fab, you know.
4 I mean, she is trying to deliver products and
5 make money and, you know, this was more of an
6 HR phone call.

7 Q. Now in the email here she said she wanted to
8 have a conversation in regards to her
9 anticipated return to work.

10 A. Mhmm.

11 Q. So as of November 8th, 2019, Marlene still
12 thought she had a job to come back to, right?

13 A. I can't venture to guess what Marlene thought
14 or didn't thought. I mean, I don't know who
15 she talked to or I don't know what was in her
16 mind. I don't.

17 Q. Prior to November 8th of 2019, you had not
18 told Marlene that she did not have a job to
19 come back to, correct?

20 A. There is something documented where I did tell
21 her that. My recollection is it was after she
22 reached out. She said I want to have this
23 conversation, and then she and I sat and I

—DEPAOLO CROSBY REPORTING SERVICES, INC.—

~~LORA SHEALY - BY MR. SANDERS - 06/23/22~~

1 took notes of the conversation. And then I
2 think after that, that was when I told her
3 that there was no job.

4 Q. Right. So that would have been after November
5 8th of 2019, correct?

6 A. Yeah, that's correct.

7 Q. So prior to November 8th, you had not told her
8 that there was no job to come back to,
9 correct?

10 A. Prior to that, we had told her she wasn't
11 guaranteed to have a job to come back to but
12 up until then that had not been officially
13 communicated to her.

14 Q. Okay. And she suggested having the call
15 sometime later in November. In fact, did you
16 talk to her the week of November 18th?

17 A. I don't remember the date.

18 Q. Okay. How many conversations did you have
19 with her after November 8th?

20 A. I don't know. I don't know. I have no idea.

21 Q. What do you recall about any of -- any
22 conversations you had with Marlene in November
23 of 2019?

~~DEPAOLO CROSBY REPORTING SERVICES, INC.~~

1 STATE OF NEW YORK)

2 COUNTY OF ERIE)

3
4 I, Carrie A. Fisher, Notary Public, in and
5 for the County of Erie, State of New York, do
6 hereby certify:

7 That the witness whose testimony appears
8 hereinbefore was, before the commencement of
9 their testimony, duly sworn to testify the
10 truth, the whole truth and nothing but the
11 truth; that said testimony was taken remotely
12 pursuant to notice at the time and place as
13 herein set forth; that said testimony was
14 taken down by me and thereafter transcribed
15 into typewriting, and I hereby certify the
16 foregoing testimony is a full, true and
17 correct transcription of my shorthand notes so
18 taken.

19 I further certify that I am neither counsel
20 for nor related to any party to said action,
21 nor in anyway interested in the outcome
22 thereof.

23 IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed my seal this
15th day of July, 2022.

19
20 

21 Carrie A. Fisher
22 Notary Public - State of New York
23 No. 01FI6240227
Qualified in Erie County
My commission expires 5/02/23

DEPAOLO CROSBY REPORTING SERVICES, INC.

135 Delaware Avenue, Suite 301, Buffalo, New York 14202
716-853-5544

EXHIBIT 10



June 13, 2019

Dear Marlene,

In an effort to help you through this process as seamlessly as possible, I wanted to follow up with some additional information:

1. Extended Leave of Absence (or LOA) Request – we have approved and submitted this through TriNet. You will receive some detailed information from the TriNet LOA department. This will cover benefits info and return to work instructions.
2. NY has a Short-Term Disability Plan for most NY State Employees. Your paperwork to begin the process of what benefits you're eligible for has been entered into the TriNet system. TriNet is currently in the process of filling out the "Employer" portion of the paperwork. When this is complete, TriNet will email you the forms (likely sometime next week) and you will need to fill out the "Employee" Section of the forms and send to NY State for processing. There will be instructions on how and where to send the form(s) in the email communication from TriNet. If you have any questions at any time regarding the process of being out on leave, filling out paperwork or your disability benefits you should feel free to contact the TriNet Employee Solutions Center Monday – Friday 4:30am – 9pm EST (800) 638-0461 or employees@trinet.com
3. In regard to your return to work date, although your LOA request is approved, we may need to fill your position while you are out and so there is no guarantee that a position will be available upon your return. Please be sure to touch base with me every month to let me know how you're doing and as we get closer to the date when you're able to return to work we will have more information about your current position availability or other open positions.

Please let me know if any questions you have, or how we can help you further. We wish you the very best and hope everything goes well.

Kind regards,

Holly Johnson
Director of Human Resources

Akoustis-Kruly 000425

EXHIBIT 11

From: Marlene Kruly <mkruly@frontiernet.net>
Sent time: 06/26/2019 03:37:24 PM
To: Mary Winters <mwinters@akoustis.com>
Subject: Kruly

[External]
Hi Mary

I know you're on vacation, and once again I apologize for my timing of this email.

I found out some other disturbing news today having to do with my medical insurance. Actually this would apply to all employees who work at Akoustis and who might have the misfortune of being ill.

Trinet will officially stop my medical benefits by August 1st, if I have not returned to work by that date. If I cannot return to work by August 1st, I then have to apply for COBRA to the tune of \$ 830/month. This does not include vision or dental health coverage- those coverages will lapse at this time. I won't even be done with my treatments by August 1st.

This whole process is a financial hardship as it is, I also have to pay back my portion of medical insurance upon my return for the months of June and July.

I thought it would be worth mentioning this because like I said previously this would be the same scenario for anyone who might happen to fall ill beyond their control, and who doesn't have additional coverage such as AFLAC or something like that. I'm not sure how this can be Trinet's SOP since disability runs for at least 6 months.

Not good news!

Marlene

EXHIBIT 12

From: Lora Shealy <lshealy@akoustis.com>
Sent time: 11/26/2019 03:30:25 PM
To: Marlene Kruly <mkruly@akoustis.com>
Subject: Waive "Benefit Draw" while on leave

Dear Marlene,

It was a pleasure speaking with you today! I wanted to send you an email to document what we discussed regarding the Benefit draw from Trinet while you were on leave. Akoustis is going to waive the repayment of the following benefits which were paid on your behalf:

8/2 \$96.68

7/19 \$96.64

7/5 \$193.04

Grand Total \$386.36

Many Thanks,

Lora Shealy
Human Resources Manager
Akoustis Technologies, Inc.
9805-A Northcross Center Court | Huntersville, NC
P +1 704.274.3591
lshealy@akoustis.com | www.akoustis.com



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-

Akoustis-Kruly 000506

EXHIBIT 13

From: Holly Johnson <hjohnson@akoustis.com>
Sent time: 08/19/2019 01:25:51 PM
To: Lora Shealy <lshealy@akoustis.com>
Subject: RE: Update

Yes I think that's perfect.

Holly Johnson

Director of Human Resources
Akoustis Technologies, Inc.
9805-A Northcross Center Court | Huntersville, NC 28078
P: 704-274-3594
hjohnson@akoustis.com | www.akoustis.com



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From: Lora Shealy <lshealy@akoustis.com>
Sent: Monday, August 19, 2019 1:24 PM
To: Holly Johnson <hjohnson@akoustis.com>
Subject: Fwd: Update

Here was her response below- what do you think if I say something like this to Ken and Dave P (should I also copy Mary? I know that sounds odd but she'd been in with some of those discussions regarding Marlene's absence and this would keep her updated too) =

Update on Marlene Kruly - Marlene has notified me that she is still undergoing treatment and also that she is having some unexpected delays in her original treatment plan/schedule. I asked her if she could provide an estimated return-to-work date and she said "I wouldn't even dare to guess at this." I will continue to keep you posted of any updates as they become available.

Lora Shealy
Human Resources Manager
Akoustis Technologies, Inc.
9805-A Northcross Center Court | Huntersville, NC
P +1 704.274.3591
lshealy@akoustis.com | www.akoustis.com



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Begin forwarded message:

From: "Marlene Kruly" <mkruly@frontiernet.net>
Subject: RE: Update
Date: August 19, 2019 at 12:16:12 PM EDT

Akoustis-Kruly 000489

To: "Lora Shealy" <lshealy@akoustis.com>

[External]

Lora,

I wouldn't even dare to take a guess at this.

From: Lora Shealy [<mailto:lshealy@akoustis.com>]

Sent: Monday, August 19, 2019 12:13 PM

To: Marlene Kruly

Subject: Re: Update

Hi Marlene,

Based on this new info, if you had to make an estimate of the date that you might return, when would that date be?

Lora Shealy

Human Resources Manager

Akoustis Technologies, Inc.

9805-A Northcross Center Court | Huntersville, NC

P +1 704.274.3591

lshealy@akoustis.com | www.akoustis.com



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On Aug 19, 2019, at 10:49 AM, Marlene Kruly <mkruly@frontiernet.net> wrote:

[External]

Hi Lora,

Just thought I would send a quick note to update you on the changes with my treatment.

I was supposed to have my 4th and final round of chemo this week, but my bloodwork is off. My white count is low, and they want to give it a chance to rebound before starting next round. They have also given me a couple of days off with radiation as well. Hopefully bloodwork will rebound and we can get this done. Haven't felt good all weekend.

So just wanted you to be updated on timing of things.

Thanks,

Marlene

EXHIBIT 14

M. Kruly Data Points

2018

There were issues in 2018 with Marlene's complaining regarding Dave, but also her own attendance issues as well as an issue where she did not properly document time worked and said she had not been paid correctly. She indicated she had entered time other than what she actually worked.

2019

Feb 12 – Dave reached out with concerns about Marlene's performance and attendance. Lora provided history of issues from 2018.

Feb 14 – talked to Dave regarding concerns with Marlene. Centered about skillset, lack of initiative and attendance

Feb 15 – Marlene reached out to Ken regarding her concerns regarding Dave. Indicated that "she laid into him..." that day as well.

Feb 19 – Talked to Marlene about concerns with Dave. Feels he is condescending. Following this, I talked with Jen. Her feedback was that Dave is a hoverer, can be defensive. Marlene has been talking to Jen about her concerns and Jen supported what she had to say. Believes Marlene is capable. Did say that she is rough and gruff. I spoke with Dave and Marlene as well. I later spoke with Kelly who said that Marlene talks poorly to Dave. Did not support all of the things Marlene and Jen said. They both asked Kelly to talk to me about this, but she did not feel it was appropriate and felt that the two had been colluding.

Feb 22 – Marlene sent me an email notifying me that Dave constantly interrupts her, stands in her space, and corrects and directs her. Feels it is over the top and said Kelly even witnessed it. He encroaches her personal space. Believed it to be "bullying and intimidating".

Feb 27 – Jenn agreed both sides have valid concerns. Agreed Dave not a bully but does think he can be difficult and not very nice.

Mar 4 – Marlene wanted to talk prior to our in person meeting the next day. Believes he has control issues. Talks to her like a child.

Mar 5 – Performance Discussion, Marlene, Dave and Holly present

Dave's Performance discussion:

- Concerns addressed:
- Invoice processing and payment – struggles to complete tasks that are not exactly the same as the regular processes.
- Excel skills – struggles to use formulas and other features critical to the reconciliation, audit and debit card processes.
- Behavior – questions authority, difficulty accepting direction from her manager, disrespectful to manager

- Independent problem identifying and solving

Created a development plan: Training plan is 4 hours per week and runs through the end of April

- Improve knowledge of excel
- Improve knowledge of Sage
- Maintain a 95% attendance rate
- Maintain professional interactions with manager and co-workers

Marlene's concerns:

1. The way Dave communicates and treats her
2. Dave's management style – micro-manages, in her space, interrupts
3. Dave does her work when she is out

Mar 11 – Marlene sent me an email seeking to clarify the outcome of the meeting, as she didn't feel her concerns of Dave's micro-management were addressed.

Mar 12 – Dave sent training email to Marlene to ensure very clear. Created a training space for her and set aside 4 hours per week for her. He will do any of her work that she is unable to complete due to training time. She was to provide a two-week status summary to Dave on March 22, April 5, April 19 and May 3.

Apr 30 – Dave sent me a document "MKruly Items to note" which lists ongoing mistakes and concerns. Discussed these issues. Dave did not determine whether the errors are considered a lot. Supposed to see improvement by May. Want to see her translate training to results. Behavior and attitude have not improved. Will be absent today and next few days because mentally unable to work due to medical tests.

May 13 – Meeting with Ken and Dave regarding Marlene. Low performer and a drain on other resources. Ken would like to move A/P back to Corporate as it's usually a part of a shared services organization. Unexpected absences continue, no marked improvement in skills. Ken plans to talk with Mary (I will draft data points and send to Dave to review).

May 20 – Data points sent to Dave to review.

May 21 – Dave responded. He talked with Mary about the concerns about performance and moving the role to NC. He and Mary agreed that making a switch of this nature would be a large negative impact on morale in NY because it would be directly linked to removing a person due to a medical problem, not because it makes sense to move the activity or because of performance. Agreed to let things play out a bit and see what happens with medical side of things.

May 22 – Dave sent Ken and email regarding his conversation with Mary. He indicated that Mary "is not aware of the performance issues", but reiterated what he indicated in his note to me.

May 30 – Dave sent me details regarding what is going on with Marlene, including attendance, and expressed concerns with inconsistent attendance and how it affects his ability to get the work done.

May 31 – last day Marlene worked.

Jun 17 – Dave indicated that Marlene’s training plan was not completed due to attendance.

Marlene’s attendance:

2018 – missed 22 days

2019 – missed 19.5 days, late 6 days

- Jan 14
- Feb 7 – 11
- Apr 15
- Apr 23 – late
- Apr 24
- Apr 25 – late
- Apr 26 – late
- 4/30 – 5/3 (all days except 5/2 were unexpected)
- 5/7 – 5/10 (only 5/7 was planned)
- 5/20 – out half day (unplanned)
- 5/22 – out half day (knew in advance)
- 5/23 – out half day (knew in advance)
- 5/24 (unplanned)
- 5/28 (unplanned, used PTO)
- 5/29 – late
- 5/30 – late
- 5/31 – late

Jun 12 – Marlene submitted a requested for Extended Leave of Absence. M. Burgess said to include language regarding no guarantee of employment as may need to fill the position. This is important to protect the company. Holly, Dave and Lora met to discuss this and what Dave wants to do. Dave indicated that he would prefer to not hire a temp and train that person and that person leave. He needs help as Marlene has already been out a lot. We all discussed and agreed to the approach in putting together information not help Marlene with LOA and also communicate per Burgess’ guidance.

Marlene declined a phone conversation and requested an email. Lora and I put together an email with the information we wanted to share with her and sent it over.

EXHIBIT 15

From: Dave Pettitt
Sent time: 05/22/2019 03:18:12 PM
To: Kenneth Boller
Cc: Holly Johnson
Subject: Accounts Payable

Hi Ken,

I had a conversation with Mary after she returned from the Board Meeting as it relates to the Accounts Payable position. Naturally she is not aware of the performance issues as it relates to the position, but was aware of Marlene's recent medical situation. Mary's discussion with you was more around the fact that Akoustis should be able to work with employees faced with hurdles to deal with. I think we all share in that sentiment, though I also explained the ability to work remotely is not something that is conducive for a role in Accounts Payable, given the amount of printing, scanning, and direct contact needed for the position to be successful.

You have mentioned the idea of moving AP to North Carolina. I thought about whether AP would be more or less efficient in North Carolina vs New York.

- Advantages of staying in NY
 - More Volume - Current invoice volume is about 60% NY / 40% NC
 - Purchasing is in NY – does allow some more efficient conversations on things like vendor issues
- Advantage of moving to NC
 - NC is more the Corporate location
 - The check run process is handled in NC
 - While NY has more invoices, North Carolina has the higher percentage of invoices that require more time to process – invoices not on production purchase orders

In the end, I think the position itself is about the same level of efficiency working from either location.

Unfortunately, Marlene's medical condition has creates a real issue in making any decision, whether it be to find a better candidate and keep in NY or move to NC. Mary and I both feel that any sort of move at this time would create a ton of negative morale in NY. If you want to move forward, we should include Mary in any future discussions.

Thanks
Dave

Dave Pettitt
Plant Financial Controller



5450 Campus Drive | Canandaigua, NY | dpettitt@akoustis.com
Phone: 1-585-919-3034 | Cell: 1-585-430-8929

EXHIBIT 16

Job Requisition Form

Today's Date: 7/12/19

Position Title: ~~Staff Accountant~~ AP Specialist

Location: ☒ North Carolina ☐ New York ☐ Other:

Department: Finance

Hiring Manager: Andrew DiFilippantonio

Job Status (Please check as applicable)

☐ Full-Time ☐ Part-time

☐ Salaried ☐ Hourly

☒ Temporary, projected length: 2-3 mths

Preferred Start Date: 7/22/19

Reason for Recruitment:

☒ **Replacement Position-** Name of person being replaced: on LOA Marlene Kruly

☐ **NEW position-** in the budget? ☐ Yes (month budgeted): _____ ☐ No

	Annual Operating Plan (AOP)	Requisitioned (if different)
Salary		<u>\$20-30/hr.</u>
Bonus %		<u>-</u>
RSUs		<u>-</u>
Options		<u>-</u>
Relocation		<u>-</u>
Recruiting fee		<u>- (Paid net)</u>
Start Date		

Job Summary:

Processing AP, audit/process credit card bills, reconcile vendor statements, process 1099s, maintain files.

Business Case:

This position is needed for the day to day processing of payables.

Job Requisition Form

SIGNATURE APPROVALS:

Date:


<i>Controller/Plant Controller:</i>	NA	
<i>Department Lead:</i>	NA	
<i>HR Director:</i>	Holly Hov	7/15/19
<i>CFO:</i>		7/12/19
<i>CEO:</i>	Chris B. Scl	7/15/19

EXHIBIT 17

9/5

...information on Kar. However,

IP ✓

- Lora? Kristen doing very well → A/P has officially moved. Andrew wants to hire. Has trained her. Since temp, could leave for a FT job.

- Lora will talk w/ Mark? rec for how to or whether to commun. w/ Marlene.
- We'll talk w/ Ken

• Kristen?

- Andrew talk to her (may not be looking)
- prep what we want; consider talking to Drew, then Mary. Lay it out, along w/ proposed messaging to Marlene

11/8

- Lora? Marlene sent em. to her + Mary. Wants a priv. 3-way call w/ them re. her return date.
- L talked to Mary, agreed L would talk to her. Mary is busy & also wasn't her mgr. L told Mary the job moved & isn't moving back. M said understood business needs, was just concerned w/ optics.

EXHIBIT 18

From: Lora Shealy <lshealy@akoustis.com>
Sent: Tuesday, September 10, 2019 2:04 PM
To: Kenneth Boller
Cc: Holly Johnson
Subject: Update on A/P position

Hi Ken,

I spoke to **A/C PRIVILEGE**

If you and Holly agree (as I anticipate that you will that have been no incidents as mentioned in his email), we can proceed with hiring Kristen if that is the direction that you feel that is best for your department. If that is the case, please let me know and we can get the ball rolling.

Many Thanks,

Lora Shealy
Human Resources Manager
Akoustis Technologies, Inc.
9805-A Northcross Center Court | Huntersville, NC
P +1 704.274.3591
lshealy@akoustis.com | www.akoustis.com



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EXHIBIT 19

From: Lora Shealy <lshealy@akoustis.com>
Sent: Thursday, September 12, 2019 5:25 PM
To: Andrew DiFilippantonio
Subject: Lora Shealy shared "Job Requisition Form_Blank" with you.

Hi Andrew, Here's the Job Req form.
Lora



This link will work for anyone in akoustis.com.



Job Requisition Form_Blank

Open



Microsoft OneDrive

Microsoft respects your privacy. To learn more, please read our [Privacy Statement](#).
Microsoft Corporation, One Microsoft Way, Redmond, WA 98052

From: Lora Shealy <lshealy@akoustis.com>
Sent: Thursday, September 12, 2019 5:26 PM
To: Andrew DiFilippantonio
Subject: Kristen

Hi Andrew,

I sent you a link in Sharepoint with a blank Job Req form. Can you please fill out for Kristen? Ken has given us the green light to hire her as a regular employee and we need to fill out this form and get all of the signatures and then we can get her an offer letter!

Thanks,
Lora

Lora Shealy
Human Resources Manager
Akoustis Technologies, Inc.
9805-A Northcross Center Court | Huntersville, NC
P +1 704.274.3591
lshealy@akoustis.com | www.akoustis.com



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-

From: Andrew DiFilippantonio <IMCEAEX-_O=EXCHANGELABS_OU=EXCHANGE+20ADMINISTRATIVE+20GROUP+20+28FYDIBOHF23SPDLT+29_CN=RECIPIENTS_CN=10B8872A7A514D4F8CB859A0371884FD-ADIFILIPP@namprd19.prod.outlook.com>
Sent: Friday, September 13, 2019 8:44 AM
To: Lora Shealy
Subject: RE: Kristen

Good Morning Lora,
I'll get this filled out and over to you this morning.

Andrew

From: Lora Shealy <lshealy@akoustis.com>
Sent: Thursday, September 12, 2019 5:26 PM
To: Andrew DiFilippantonio <adifilipp@akoustis.com>
Subject: Kristen

Hi Andrew,
I sent you a link in Sharepoint with a blank Job Req form. Can you please fill out for Kristen? Ken has given us the green light to hire her as a regular employee and we need to fill out this form and get all of the signatures and then we can get her an offer letter!
Thanks,
Lora

Lora Shealy
Human Resources Manager
Akoustis Technologies, Inc.
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From: Lora Shealy <lshealy@akoustis.com>
Sent: Friday, September 13, 2019 10:10 AM
To: Andrew DiFilippantonio
Subject: Re: Job Rec

I feel good with ...or \$ per hour. What about you? Her bonus is %.

Lora Shealy
Human Resources Manager
Akoustis Technologies, Inc.
Office: (704) 997-5735 x104
Cell: (704) 763-0111
Email: lshealy@akoustis.com

On Sep 13, 2019, at 10:03 AM, Andrew DiFilippantonio <adifilipp@akoustis.com> wrote:

On her application she put \$. She's at \$4 . We discussed bumping her to \$ or \$ an hour which is and . One other thing, I forgot to ask about bonus. Would she be at %?

From: Lora Shealy <lshealy@akoustis.com>
Sent: Friday, September 13, 2019 10:01 AM
To: Andrew DiFilippantonio <adifilipp@akoustis.com>
Subject: Re: Job Rec

I thought we were going to give her the higher amount that she originally asked for?

Lora Shealy
Human Resources Manager
Akoustis Technologies, Inc.
Office: (704) 997-5735 x104
Cell: (704) 763-0111
Email: lshealy@akoustis.com

On Sep 13, 2019, at 9:58 AM, Andrew DiFilippantonio <adifilipp@akoustis.com> wrote:

That works for me. Lastly, do we want to leave her at \$ /hour or give her a bump when she comes on permanent?

From: Lora Shealy <lshealy@akoustis.com>
Sent: Friday, September 13, 2019 9:56 AM
To: Andrew DiFilippantonio <adifilipp@akoustis.com>
Subject: Re: Job Rec

How about sept 23 for start date? That gives us time to type offer letter. Does that work for u?
Agree...hourly.

So let's go with and ! If you can get sign off from Ken, Holly and Jeff today that's awesome. Then we will type up offer and get to her first of next week. Thanks!

Lora Shealy

Human Resources Manager
Akoustis Technologies, Inc.
Office: [\(704\) 997-5735 x104](tel:7049975735)
Cell: [\(704\) 763-0111](tel:7047630111)
Email: lshealy@akoustis.com

On Sep 13, 2019, at 9:52 AM, Andrew DiFilippantonio <adifilipp@akoustis.com> wrote:

Hey!

I do agree RSUs and Options is better. My only questions were:

1. When do we want her perm start date to be?
2. Hourly or Salaried and Holly said hourly
3. The RSU/Option piece which you just answered.

Thank you,
Andrew

From: Lora Shealy <lshealy@akoustis.com>

Sent: Friday, September 13, 2019 9:50 AM

To: Andrew DiFilippantonio <adifilipp@akoustis.com>

Subject: Re: Job Rec

Hey!

I've got a personal appointment from 10-1 but can email freely during that time. Can you put questions in an email? (I will drop in around 130-230 but have to work on equity work for Todd). I asked Holly and we can include for Kristen - options and RSUs or we could do options but I think the first one is better. Do you agree?

Lora Shealy

Human Resources Manager
Akoustis Technologies, Inc.
Office: [\(704\) 997-5735 x104](tel:7049975735)
Cell: [\(704\) 763-0111](tel:7047630111)
Email: lshealy@akoustis.com

On Sep 13, 2019, at 9:35 AM, Andrew DiFilippantonio <adifilipp@akoustis.com> wrote:

Hi Lora,
Meghan said you may or may not be coming in today. If you have a free minute to discuss the job requisition form (and Kristen), I would greatly appreciate it.

Thanks,

Andrew DiFilippantonio

Accounting Manager

Akoustis Technologies, Inc.

9805-A Northcross Center Court | Huntersville, NC

28078

Direct: 980-689-4158

adifilipp@akoustis.com | www.akoustis.com

EXHIBIT 20

Job Requisition Form

Today's Date: 9-13-19
 Position Title: AP Specialist
 Location: ☒ North Carolina ☐ New York ☐ Other:
 Department: Finance
 Hiring Manager: Andrew DiFilippantonio

Job Status (Please check as applicable)
☐ Full-Time ☐ Part-time
☐ Salaried ☒ Hourly
☐ Temporary, projected length: _____

Preferred Start Date: 9-23-19

Reason for Recruitment:

☒ **Replacement Position**- Name of person being replaced: AP Specialist - Marlene Kruly
☐ **NEW position**- in the budget? ☐ Yes (month budgeted): _____ ☐ No

	Annual Operating Plan (AOP)	Requisitioned (if different)
Salary	<u>\$45,884.80 / 22.06/hr</u>	<u>\$24 / hour</u>
Bonus %	<u>10%</u>	<u>10%</u>
RSUs		<u>1000</u>
Options		<u>1000</u>
Relocation	<u>N/A</u>	
Recruiting fee	<u>N/A</u>	
Start Date		

Job Summary:

Processing and payment of all payables.

Business Case:

Self-explanatory.

Job Requisition Form

SIGNATURE APPROVALS:

Date:

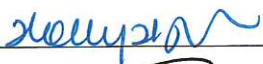


Controller/Plant Controller:		
Department Lead:		
HR Director:		9/13/19
CFO:		9/13/19
CEO:		9/13/19

EXHIBIT 21

From: Marlene Kruly <mkruly@frontiernet.net>
Sent time: 09/13/2019 02:42:19 PM
To: Lora Shealy <lshealy@akoustis.com>
Subject: FW: Oncology Letters
Attachments: OncologyLetters9-13-19.pdf

[External]

Lora,

I have attached two letters from my Dr.'s.

One is from the Radiation Oncologist and the other is from the Oncologist.

The one from Oncologist was issued by the NP, if you would prefer that the Dr. sign this himself, let me know and I will have him do it when I meet with him on Monday, 9/16.

Thank you,

Marlene

From: Marlene Kruly [mailto:mkruly@frontiernet.net]
Sent: Friday, September 13, 2019 2:26 PM
To: mkruly@frontiernet.net
Subject: Oncology Letters



**RALPH A
BRASACCHIO, MD
Radiation Oncology
at Sands Cancer
Center**

395 West St
Ste 101
Canandaigua, NY 14424
585-396-6180

September 5, 2019

Patient: **Marlene A Kruly**
MR Number: **774017**
Date of Birth: [REDACTED]
Date of Visit: **9/5/2019**

To Whom It May Concern,

Marlene is currently under my care and will not be able to return to work until 12/1/19.

Please feel free to call my office with any concerns or questions.

Thank you,

If you have questions, please do not hesitate to call me.

Electronically signed by RALPH A BRASACCHIO, MD 9/5/2019 10:18 AM

Akoustis-Kruly 000498

Letter Details

WILMOT CANCER CENTER
Interlakes Oncology and Hematology



**INTERLAKES
ONCOLOGY AT
CANANDAIGUA
395 West St
Canandaigua NY
14424-1789
Dept: 585-393-7040
Dept Fax: 585-394-
4218**

September 10, 2019

Patient: **Marlene A Kruly**
Date of Birth: [REDACTED]
Date of Visit: **9/10/2019**

To Whom It May Concern:

Marlene A Kruly is currently under our care and will not be able to return to work until 12/1/19. Thank you.

If you have any questions or concerns, please don't hesitate to call.

Sincerely,

SUSAN E ZUMBO, NP

Electronically signed by SUSAN E ZUMBO, NP 9/10/2019 5:20 PM

CC:
No Recipients

This letter was initially viewed by Marlene A Kruly at 9/10/2019 5:40 PM.

EXHIBIT 22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
ROCHESTER DIVISION

MARLENE A. KRULY,

Plaintiff,

v.

AKOUSTIS TECHNOLOGIES, INC.,

Defendant.

Case No. 6:21-cv-06181-FPG-MWP

**DECLARATION OF HOLLY
JOHNSON IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

1. My name is Holly Johnson. I am over the age of 18 and I am competent to make the statements in this Declaration. I declare under penalty of perjury that the statements in this Declaration are true and correct to the best of my knowledge.

2. I make all statements in this Declaration based on my personal knowledge.

3. I am the Director of Human Resources for Akoustis, Inc.

4. On September 13, 2019 at 2:42 p.m., Plaintiff Marlene Kruly sent an e-mail to Lora Shealy, Akoustis's Human Resources Manager, that attached a doctor's note setting for an anticipated return to work date of December 1, 2019. (Appendix at Ex. 21, September 13, 2019 E-mail).¹

5. At the time the e-mail was received, Akoustis had already hired a permanent replacement to fill Kruly's Accounts Payable position and there was no position for Kruly to return to.

¹ The Appendix refers to the Appendix to Defendant Akoustis Technologies, Inc.'s Statement of Material Facts Pursuant to Local Rule 56(a)(1) submitted herewith.

6. Given our understanding that Kruly was undergoing cancer treatment, it was determined that Akoustis would not inform Kruly at that time that she had no position to return to so that she could focus on her recovery.

7. Once Kruly contacted Ms. Shealy a few months later, in November 2019, to discuss plans for her to return to work, we determined it was appropriate to advise Kruly that the position had been filled and there was no position to return to.

8. I declare under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746(2).


Holly Johnson

Dated: September 15, 2022